STATE OF MICHIGAN IN THE SUPREME COURT

HERALD COMPANY, INC., d/b/a BOOTH NEWSPAPERS, INC. and THE ANN ARBOR NEWS,

Supreme Court Case No. 128263

Case No. GC-W-04-0000117-CZ

Plaintiffs,

v.

EASTERN MICHIGAN UNIVERSITY BOARD OF REGENTS,

Defendant.

SOBLE ROWE KRICHBAUM, LLP Jonathan D. Rowe (P35384) Attorneys for Plaintiff-Appellant 221 N. Main St., Suite 200 Ann Arbor, MI 48104 (734) 662-9252 Court of Appeals Case No. 254712
Washtenaw County Circuit Court

PLUNKETT & COONEY Mary Massaron Ross (P43885) Attorneys for Defendant-Appellee 535 Griswold, Suite 2400 Detroit, MI 48226

(313) 965-4801

BRIEF OF AMICUS CURIAE DETROIT FREE PRESS, INC. IN SUPPORT OF PLAINTIFF-APPELLANT HERALD COMPANY, INC.

ORAL ARGUMENT NOT REQUESTED

HONIGMAN MILLER SCHWARTZ AND COHN LLP
Herschel P. Fink (P13427)
Brian D. Wassom (P60381)
Attorneys for Amicus Curiae Detroit Free Press, Inc.
2290 First National Building
Detroit, MI 48226
(313) 465-7400
hpf@honigman.com
bdw@honigman.com



Amicus curiae Detroit Free Press, Inc. ("Free Press") supports Plaintiff-Appellant Herald Company, Inc.'s ("Herald") appeal from the February 15, 2005 opinion entered by the Court of Appeals in *Herald Company, Inc. v. Eastern Michigan University Board of Regents*, Case No. 254712, 2005 Mich App LEXIS 279.

The Free Press likewise supports Herald's requested relief, namely:

- 1. An order expediting proceedings in this Freedom of Information Act ("FOIA") case, as required by MCL 15.240(5).
- 2. An order reversing the Court of Appeals.
- An order requiring Defendant-Appellee Eastern Michigan University Board of Regents ("EMU") to produce immediately an unredacted copy of the September
 2003 Doyle letter, the sole document at issue.
- 4. An order directing the trial court to order EMU to pay Herald's reasonable attorneys' fees for prosecuting this FOIA case.

QUESTIONS PRESENTED FOR REVIEW

Amicus curiae Detroit Free Press, Inc. ("Free Press") incorporates by reference the Questions Presented for Review listed in Plaintiff-Appellant Herald Company, Inc.'s Brief.

TABLE OF CONTENTS

31A1			D RELIEF SOUGHT	i
QUES	STIONS	S PRE	SENTED FOR REVIEW	ii
TABI	E OF	CONT	ENTS	iii
TABI	E OF	AUTH	IORITIES	iv
STAT	EMEN	T OF	MATERIAL PROCEEDINGS AND FACTS	vi
III.	Argument			1
	A.	Intro	duction	1
	B.	Stanc	dard of Review	2
	C.		nigan's FOIA Is a "Pro Disclosure" Statute and nptions Are Narrowly Construed	4
	D.	The Information Sought in This Case Serves the Fundamentally Important Function of Holding Officials Accountable to the Public		6
			Majority Wholly Abdicated Its Responsibility to y the Text of the Statute to the Undisputed Facts	8
		1.	The Undisputed Facts of This "Particular Instance" Weigh Heavily in Favor of Release	8
		2.	FOIA Does Not Permit Factual Material to Be Withheld	9
	F	Conc	clusion	10

TABLE OF AUTHORITIES

CASES

Aug v National Railroad Passenger Corp, 425 F Supp 946 (D.D.C., 1976)	7
Booth Newspapers, Inc. v Muskegon Probate Judge, 15 Mich App 203 (1968)	4
Booth Newspapers v University of Mich Bd of Regents, 444 Mich. 211 (1993)	7
Burton v Tuite, 78 Mich 363 (1889)	5
Cochran v United States, 770 F.2d 949 (11th Cir., 1985)	7
Detroit News, Inc. v Detroit, 185 Mich App 296 (1990)	6
Dobronski v FCC, 17 F.3d 275 (9th Cir., 1994)	7
Federated Publ'ns v City of Lansing, 467 Mich 98 (2002)	2,3,4
Herald Co., Inc. v Ann Arbor Public Schools, 224 Mich App 266 (1997)	6
Herald Co v City of Bay City, 463 Mich 111 (2000)	7
Herald Company, Inc. v. Eastern Michigan University Board of Regents, Case No. 254712, 2005 Mich App LEXIS 279	2
Int'l Union, United Plant Guard Workers (UPGWA) v Dep't of State Police, 422 Mich 432 (1985)	7,8,9
Jones v Dep't of Corr, 468 Mich 646 (2003)	4
Nowak v Auditor General, 243 Mich 200, 219 NW 749 (1928)]	5

State Employees Ass'n v Dep't of Management & Budget, 428 Mich 104, 404 NW2d 606 (1987)	5
Swickard v Wayne County Medical Examiner, 438 Mich 536 (1991)	$\it \Lambda$
Swickard v Wayne Co Med Examiner, 438 Mich 536 (1991)	
Thomas v City of New Baltimore, 254 Mich App 196 (2002)	
United States Dep't of Defense v Fed Labor Relations Auth, 510 US 487 (1994)	

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amicus curiae Detroit Free Press, Inc. ("Free Press") incorporates by reference the Statement of Material Proceedings and Facts listed in Plaintiff-Appellant Herald Company, Inc.'s Brief.

ARGUMENT

A. <u>Introduction</u>

Amicus Curiae Detroit Free Press, Inc. ("the Free Press") files this brief supporting Plaintiff-Appellant Herald Company, Inc. ("Herald Company") and supporting the reversal of the decision of the Court of Appeals in this matter. The Free Press, Michigan's largest daily newspaper, does not routinely file briefs in cases in which it is not a party. It feels compelled to do so here because the public's access to records in which it has a strong interest is threatened. The Herald Company sought, under the Michigan Freedom of Information Act ("FOIA"), a letter written by a vice president of Eastern Michigan University to a member of its Board of Regents, critiquing the role of the University's president in spending large amounts of public money on the President's residence ("the Doyle Letter"). The Court of Appeals found that these records were exempt from disclosure under FOIA's "frank communications" exception—over the vigorous dissent of Chief Judge William Whitbeck.

This is not a difficult case, on its law or facts. Both the trial court and the Court of Appeals majority chose to ignore the governing statutory language, and therefore committed clear error. This is, however, a very important case. The majority's decision opens the door for courts across this State to avoid the carefully crafted statutory factors and balancing tests woven throughout the FOIA by merely incanting certain magic phrases. As Chief Judge Whitbeck warned, the standard followed below—which is based on a tortured reading of this Court's precedents—renders trial courts' application of FOIA virtually unreviewable, and the statute itself a "dead letter." Ex A.

This prospect is unacceptable. The Free Press and countless other news organizations rely on the FOIA to obtain critical information necessary to hold our public officials accountable. Earlier this year, newspapers across the country celebrated "Sunshine Week," in honor of the laws

which protect the public's right to know how its government operates. *See* articles attached as Ex B. In the past two years alone, Free Press reporters have used FOIA requests to expose "the high-dollar details behind a recent Oakland County school district scandal[;] how the federal government turned its back on ill and aged World War II vets exposed to dangerous chemical testing[; and] how some public employees retire with comfy six-figure pensions," among many other stories. *Id.* Nearly every one of these requests run into staunch resistance and delay from recalcitrant public servants less than eager to allow the public to supervise their performance. Decisions such as that of the majority below are a boon to those officials who hide from public scrutiny, and a slap in the face to dedicated journalists whose tireless, but often overlooked efforts enable our participatory form of government to exist.

This Court should reverse the decision of the Court of Appeals.

B. Standard of Review

The applicable standard of review depends on the nature of the FOIA exemption at issue:

Several statutory exemptions exist in the FOIA. Depending on the particular language of an exemption, judicial determinations of its applicability may implicate different standards of appellate review. We hold that the application of exemptions involving legal determinations are reviewed under a de novo standard. Exemptions involving discretionary determinations, such as application of the instant exemption requiring a circuit court to engage in a balancing of public interests, should be reviewed under a deferential standard. We therefore hold that the clearly erroneous standard of review applies to the application of exemptions requiring determinations of a discretionary nature. A finding is "clearly erroneous" if, after reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made.

Federated Publ'ns v City of Lansing, 467 Mich 98, 107 (2002) (citations omitted, emphasis added). The "frank communications" exemption at issue here requires the trial court to make determinations of a discretionary nature:

(1) A public body may exempt from disclosure as a public record under this act:

* * *

(m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. *This exemption does not apply unless* the public body shows that *in the particular instance* the public interest in encouraging frank communication between officials and employees of public bodies *clearly outweighs* the public interest in disclosure.

MCL 15.243(1)(m) (emphasis added). Therefore, the trial court's determination that the public interest in frank communication "clearly outweighs the public interest in disclosure" in "this particular instance," and its determination of what the facts that pertain in this "particular instance" are—such as the circumstances surrounding the creation of the Doyle Letter and Doyle's decision to retire—are entitled to "clear error" review. Federated Pubs, Inc v City of Lansing, 467 Mich 98 (2002).

Chief Judge Whitbeck identified two important ways in which the majority disregarded this standard. The majority, while acknowledging the "clear error" standard, went on to give almost absolute deference to the trial court's outcome, and to describe its review in terms of deference to credibility determinations—language which smacks of the even more demanding "abuse of discretion" standard. Ex A at *34, 54-55. As Chief Judge Whitbeck observed, "[c]redibility is, generally, not at issue in FOIA cases and most certainly is not an issue in *this* FOIA case; the trial court here made its decision after an *in camera* review of the Doyle letter in which credibility determinations played no part." *Id.* at *55. "By conflating the [two standards], the majority has made the trial court's decision virtually unreviewable." *Id.* at *57.

Second, both the trial court and the majority based their analysis on general observations

concerning the value of privacy in "frank communications," and on cases that involved simple balancing between the competing interests in privacy versus disclosure. Neither these authorities nor the majority's analysis implement the explicit presumption of MCL 15.243(1)(m), which requires disclosure unless the factors favoring secrecy "clearly outweigh" that presumption in this "particular instance." "Thus, in the frank communications exception the competing interests in non-disclosure versus disclosure do not stand on equal footing. Rather, the Legislature has weighted the balance in favor of disclosure." Ex A at *50 (Whitbeck dissent).

There is therefore a serious question not only of whether the trial court and Court of Appeals erred, but whether they correctly interpreted and applied the unambiguous instruction of MCL 15.243(1)(m). It is also questionable whether the Court of Appeals correctly interpreted the clear error standard of review as applied to this specific exemption. Both of these are questions for *de novo* review. "This Court reviews *de novo* the interpretation and application of a statute as a question of law." *Jones v Dep't of Corr*, 468 Mich 646, 651 (2003).

C. Michigan's FOIA Is a "Pro Disclosure" Statute and Exemptions Are Narrowly Construed

This Court has succinctly restated the public policy considerations which underlie FOIA and Michigan's century-long tradition of open government. In *Swickard v Wayne County Medical Examiner*, 438 Mich 536 (1991), this Court stated:

Before the enactment of FOIA in 1977, Michigan enjoyed a long history of allowing citizens free access to public records. Booth Newspapers, Inc. v Muskegon Probate Judge, 15 Mich App 203; 166 NW2d 546 (1968). In Booth, the Court of Appeals stated:

The fundamental rule in Michigan on the matter before us, first enunciated in the case of *Burton v Tuite* (1889), 78 Mich 363 [44 NW 282], is that citizens have the general right of free access to, and public inspection of, public records.

The *Nowak* [v Auditor General, 243 Mich 200; 219 NW 749 (1928)] decision has "placed Michigan at the vanguard of those states holding that a citizen's accessibility to public records must be given the broadest possible effect." [Id. at 205, 207]

Some ten years after the federal FOIA was enacted by Congress, Michigan enacted its FOIA in 1997. One of the reasons prompting the legislation was concern over abuses in the operation of government. A policy of full disclosure underlies the FOIA. The preamble to the act, MCL 15.231(2); MSA 4.1801(1)(2), provides:

It is the public policy of this state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Section 3(1) of the Act states:

Upon an oral or written request which describes the public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy or receive copies of a public record of a public body, except as otherwise expressly provided by section 13.

Therefore, all public records are subject to full disclosure under the act unless the material is specifically exempt under § 13. Also, when a public body refuses to disclose a requested document under the act, and the requestor sues to compel disclosure, the public agency bears the burden of proving that the refusal was justified under the act. MCL 15.240(1); MSA 4.1801(10)(1).

In construing the provisions of the act, we keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed. State Employees Ass'n v Dep't of Management & Budget, 428 Mich 104; 404 NW2d 606 (1987).

438 Mich at 543-544 (emphasis added).

"It is the intent of the FOIA to deter efforts of agency officials to prevent disclosure of mistakes and irregularities committed by them or the agency and to prevent needless denials of information." *Herald Co., Inc. v Ann Arbor Public Schools*, 224 Mich App 266, 274 (1997) (citations omitted).

Except only as to specifically restricted records, the duty of the custodian under Michigan law is not only to permit, but *affirmatively to facilitate* the right of the public to see and know its own business. Not only are exemptions to disclosure narrowly construed, the burden is on the public body to prove that nondisclosure was proper.

Once a request has been made under FOIA and denied by defendant, the burden falls upon defendant to show a viable defense... Exemptions are affirmative defenses to requests for documents. An affirmative defense cannot succeed unless the matters upon which it rests are proved. The burden of producing evidence and establishing these facts rests upon the defendant.

Detroit News, Inc. v Detroit, 185 Mich App 296, 300 (1990) (citations omitted); see MCL 150.240(4).

In short, the fundamental law of Michigan is that government records are the public's records. The public has the right to inspect and copy all such records except those few and specific records which the public, acting through the Legislature, has itself restricted. No such restrictive discretion lies in the custodian, the records are not his records nor has such discretion been legislatively or judicially granted to the custodian.

D. The Information Sought in This Case Serves the Fundamentally Important Function of Holding Officials Accountable to the Public

"[T]he core purpose of the FOIA . . . is contributing significantly to public understanding of the operations or activities of the government." *Herald Co v City of Bay City*, 463 Mich 111, 126 (2000) (quoting *United States Dep't of Defense v Fed Labor Relations Auth*, 510 US 487,

495 (1994)). "It is beyond question that the . . . [FOIA was] enacted by the Legislature to promote openness and accountability in government." *Booth Newspapers v University of Mich Bd of Regents*, 444 Mich. 211, 236 (1993). "Accountability, in turn, depends on information; we cannot make an informed judgment about whether a decision of a government official was the correct one without having at least some information about that decision." Ex A at *45 (Whitbeck dissent).

"Therefore, courts favor disclosure under the FOIA balancing test when a government official's actions constitute a violation of public trust." *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 595 (1991); *Thomas v City of New Baltimore*, 254 Mich App 196, 201 (2002) (FOIA necessary to "hold public officials accountable for the manner in which they discharge their duties"). "[T]he matter here involves the [EMU] administration's expenditure of public funds. To [Chief Judge Whitbeck], this fact is central to [the] consideration of this case," Ex A at *60. Nothing could be more central to operation or activities of government than how it spends the public's money.\(^1\) Therefore, "the question of the president's accountability, not just to the University's Board of Regents but also to the taxpaying public, for these expenditures is at the core of this case." *Id.* at *60-61.

Of course, "[t]he FOIA does not require that all requests further the core purpose" of enlightening the public about its government in order to be granted. *Int'l Union, United Plant Guard Workers (UPGWA) v Dep't of State Police*, 422 Mich 432, 441 (1985). But the fundamental importance of the Doyle Letter's subject matter underscores the degree to which

¹ See, e.g., Dobronski v FCC, 17 F.3d 275, 278 (9th Cir., 1994) ("Dobronski will have uncovered a misuse of public monies. Disclosure of such abuse is in the public interest"); Cochran v United States, 770 F.2d 949, 956 (11th Cir., 1985) ("the balance struck under FOIA exemption six overwhelming favors the disclosure of information relating to a violation of the public trust by a government official, which certainly includes the situation of a misuse of public funds"); Aug v National Railroad Passenger Corp, 425 F Supp 946 (D.D.C., 1976) (accountability of the persons being paid in public funds outweighed the possible privacy invasion).

EMU must demonstrate a countervailing interest in secrecy in order to avoid Herald's request. On the contrary, neither EMU, the trial court, nor the Court of Appeals cited any case-specific fact which justified keeping the Doyle Letter secret, much less reasons that "clearly outweighed" the heavy presumption in favor of disclosure. The majority therefore ignored the statute by permitting EMU to withhold the Doyle Letter.

E. The Majority Wholly Abdicated Its Responsibility to Apply the Text of the Statute to the Undisputed Facts

1. The Undisputed Facts of This "Particular Instance" Weigh Heavily in Favor of Release

"The majority addresse[d] the particularized circumstances of this case in one very specific instance and then in a series of very broad statements." Ex A at *57 (Whitbeck dissent). Its one and only case-specific observation is that EMU "ultimately released a comprehensive report on the investigation into the University House controversy." *Id.* at *58. This factor, taken alone, *could* suggest that production of the Doyle Letter is unnecessary because all of the facts concerning the matter have been disclosed. But that is not the case. Chief Judge Whitbeck observed that "an *in camera* review of the Doyle letter plainly discloses that all the facts are *not* in the public record." *Id.* The majority did not disagree. This fact, therefore, does not support the majority's holding.

"The majority then offer[ed] a series of generalized policy statements in support of its view," Ex A at *59, that disclosure of *letters like Doyle's* would tend to discourage "insiders" like him to write similar letters in the future. It speculated that

when a high level administrator is asked to give his opinion of the highest ranking official in the administration, . . . whose favor he needs for job security, the insider may be naturally reluctant to trust the outsider and to trust the confidentiality of the communication. * * * There is a substantial risk that these vital sources of candid opinions would dry up were insiders justifiably

fearful that their candid appraisals would make front-page headlines. * * * The natural tendency to "circle the wagons" or "play it safe," coupled with apprehension of retaliation if the written opinion is made public, would, we fear, deprive the Board of an important perspective.

Id. at *27-28. This forms the entire factual basis for the majority's holding. Unfortunately, it has nothing whatsoever to do with the "particular instance" of the Doyle Letter. These are merely generic sociological speculations, untethered to any fact in the case. Whether or not they may be true in general, or after the release of the Doyle Letter, is wholly irrelevant to this "particular instance."

Even worse, the actual facts of the case entirely belie the majority's hypothetical concerns. As Chief Judge Whitbeck noted and the majority ignored, the undisputed record established that Doyle had already decided to retire months before being asked to write the Letter, and did resign only days after submitting it. It cannot be, then, that Doyle's "apprehension of retaliation" would have caused him to "play it safe" by not revealing his candid opinions, since he no longer needed the president's "favor" for his "job security." Therefore, these observations also fail to justify the majority's holding.

The majority said nothing further about the particularized facts of this case, let alone enough to "clearly outweigh" the statutory presumption in favor of disclosure. Its holding, therefore, is clearly erroneous.

2. FOIA Does Not Permit Factual Material to Be Withheld

The Free Press will not repeat the Herald Company's argument at pages 24-30 of its Application pertaining to the wholly factual elements of the Doyle Letter. It suffices to say that the Herald Company is correct—FOIA explicitly requires public bodies to sever and produce any purely factual information from any document which is otherwise exempt from disclosure. Both

the majority and Chief Judge Whitbeck acknowledged that the Doyle Letter contained severable factual material. The Herald ably explains why the majority's rationale for permitting EMU to withhold this material is transparently bogus. As a pure question of law not subject to any exemption or balancing of interests, this is a matter for de novo review by this Court.

F. Conclusion

The Court of Appeal's ruling flies in the face of the FOIA and Michigan's century-long tradition of open government. The majority paid lip service only to the clear language of FOIA which places the burden on the public body to prove that the public interest in secrecy "clearly outweighs" the public interest in disclosure "in this particular instance," and instead based its ruling on generic platitudes that are specifically undercut by the undisputed facts in this case. As Chief Judge Whitbeck aptly summarized, if this decision is allowed to stand, "then the Legislature's broad policy decisions in the FOIA and its carefully-tuned implementing mechanisms are without meaning." Ex A at *73-74. Public bodies will be free to shield any potentially embarrassing communication between its members, even if that communication reveals—as the Doyle Letter is understood to do—a breach of public trust regarding the expenditure of public funds. Holding public officials accountable in such central functions of government is the core purpose of FOIA.

This Court should reverse the decision of the Court of Appeals.

HONIGMAN MILLER SCHWARTZ AND COHN LLP

By: Herschel P. Fink (P13427)

Brian D. Wassom (P60381)

2290 First National Building

660 Woodward Avenue

Detroit, MI 48226 (313) 465-7594

hpf@honigman.com

bdw@honigman.com

Dated: July 28, 2005

PROOF OF SERVICE

DETROIT.1843745.1





Source: Legal > States Legal - U.S. > Michigan > Cases > MI State Cases, Combined action
Terms: eastern michigan and whitbeck (Edit Search)

✓ Select for FOCUS[™] or Delivery ³

2005 Mich. App. LEXIS 279, *

HERALD COMPANY, INC., d/b/a BOOTH NEWSPAPERS, INC., and d/b/a, ANN ARBOR NEWS, Plaintiff-Appellant, v. **EASTERN MICHIGAN** UNIVERSITY BOARD OF REGENTS, Defendant-Appellee.

No. 254712

COURT OF APPEALS OF MICHIGAN

2005 Mich. App. LEXIS 279

February 10, 2005, Decided

NOTICE: [*1] THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE MICHIGAN COURT OF APPEALS REPORTS.

PRIOR HISTORY: Washtenaw Circuit Court, LC No. 04-000117-CZ.

DISPOSITION: Trial court's grant of summary judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff newspaper appealed a decision of the Washtenaw Circuit Court (Michigan), which denied its motion for a peremptory reversal of its holding that a letter regarding the financial aspects of the building of the residence of the president of defendant state university fell within the Freedom of Information Act (FOIA) exemption of Mich. Comp. Laws § 15.243(1)(m).

OVERVIEW: The university board undertook an investigation into alleged overexpenditures for the president's resident and the newspaper requested a copy of a letter from the vice president of finance regarding the construction of the president's house. The court held that because the goal of both FOIA and its exemptions was good government, not disclosure for disclosure's sake, the legislature, by placing the frank communication exemption within FOIA, made the policy judgment that public welfare was more important than public knowledge. To make the letter public would likely hurt, not advance, the public interest. Because the court agreed with the trial court that the public interest in protecting frank communications clearly outweighed the interest in disclosure, it concluded that the trial court did not commit clear error by so ruling. There was no question that the board was able to discharge its duty due to its ability to obtain the opinions and assessments of insiders about other insiders, information that the board may not have obtained absent the frank communication exception.

OUTCOME: The court affirmed the decision of the trial court.

CORE TERMS: disclosure, exemption, frank, public interest, outweigh, balancing, public body, clearly erroneous, nondisclosure, standard of review, non-disclosure, encouraging, governor, candid, expenditure, exemptible, in camera, accountability, deference, insider, public knowledge, governance, oversight, inmate, rating, public welfare, credibility, discretionary, ignoring, game

LexisNexis(R) Headnotes + Hide Headnotes

Education Law > Administration & Operation > Boards of Postsecondary Schools > Authority

HN1 The Michigan Constitution confers enormous responsibility and authority on
boards of public universities: The Constitution grants to boards of public
universities the supervision of the institution and the control and direction of all
expenditures from the institution's funds. Mich. Const art VIII, § 6. In furtherance
of this constitutional mandate, the Michigan Legislature similarly invests
university boards with this significant oversight role. Mich. Comp. Laws § 390.551
et seq. More Like This Headnote

Education Law > Administration & Operation > Boards of Postsecondary Schools > Authority

HN2 A university board of control shall have general supervision of its institution, the

control and direction of all funds of the institution, and such other powers and
duties as may be prescribed by law. Mich. Comp. Laws § 390.553. More Like This Headnote

Administrative Law > Governmental Information > Freedom of Information

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN3 The rule of law and the rationale for the appropriate level of deference appellate courts are to give to trial courts that conduct the difficult and fact sensitive balancing tests under the Freedom of Information Act (FOIA). The standard of review for FOIA cases is not contained in the legislation itself, but in case law. Exemptions involving discretionary determinations requiring a circuit court to engage in a balancing of public interests, should be reviewed under a deferential standard. Therefore, the clearly erroneous standard of review applies to the application of exemptions requiring determinations of a discretionary nature. A finding is "clearly erroneous" if, after reviewing the entire evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made. More Like This Headnote

Administrative Law > Governmental Information > Freedom of Information

#N4 Though the Freedom of Information Act's disclosure policy serves the public interest in good governance, the Michigan Legislature made clear, in the same legislation, that the public interest in good governance may also be served by the non-disclosure policy illustrated by specific exemptions: In performing the requisite balancing of public interests, the circuit court should remain cognizant of the special consideration that the Legislature has accorded an exemptible class of records. More Like This Headnote

Administrative Law > Governmental Information > Freedom of Information

HNS Under federal and state freedom of information acts (FOIAs), the public has a broad right to inspect government documents, and the general policy promoted is one of "full disclosure." This right to review documents under FOIA promotes the public interest in good government. Yet, the Michigan Legislature clearly determined that there are certain circumstances where revealing information would undermine rather than further good governance. Hence, the public's right to view government documents is conditional, and FOIA contains specific exemptions that qualify, and in certain cases, override the right to disclosure. More Like This Headnote

Administrative Law > Governmental Information > Freedom of Information

HN6 The public's interest in promoting frank communications necessary to the proper functioning of government, may at times, outweigh the disclosure policy of the Freedom of Information Act (FOIA), and thus included a specific exemption in the FOIA for: Communications and notes within a public body or between public

bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. Mich. Comp. Laws § 15.243(1)(m). More Like This Headnote

Administrative Law > Governmental Information > Freedom of Information

HN7 To conduct its analysis under Mich. Comp. Laws § 15.243, the trial court will ask and answer these questions: (1) did the public body show that the requested document covers other than purely factual materials; (2) did the public body show that the document is preliminary to a final agency determination of policy or action; and (3) did the public body establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure. More tike This Headnote

Administrative Law > Governmental Information > Freedom of Information

#N8 When the public body makes the proper showing that good governance is better served by nondisclosure rather than disclosure, it will not be required to release the information. To make the proper showing, the public body must show that the information falls in the frank communications exemption, and that nondisclosure clearly outweighs the public's interest in disclosure.

More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

**HN9 A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Mich. R. App. P. 52(a) if it undertakes to duplicate the role of the lower court. In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN10 Where a trial court makes discretionary determinations involving balancing of public interests an appellate court is not to disturb the trial court's findings simply because the court may disagree. Rather, it may overrule the trial court only when the trial court "clearly" errs. More Like This Headnote

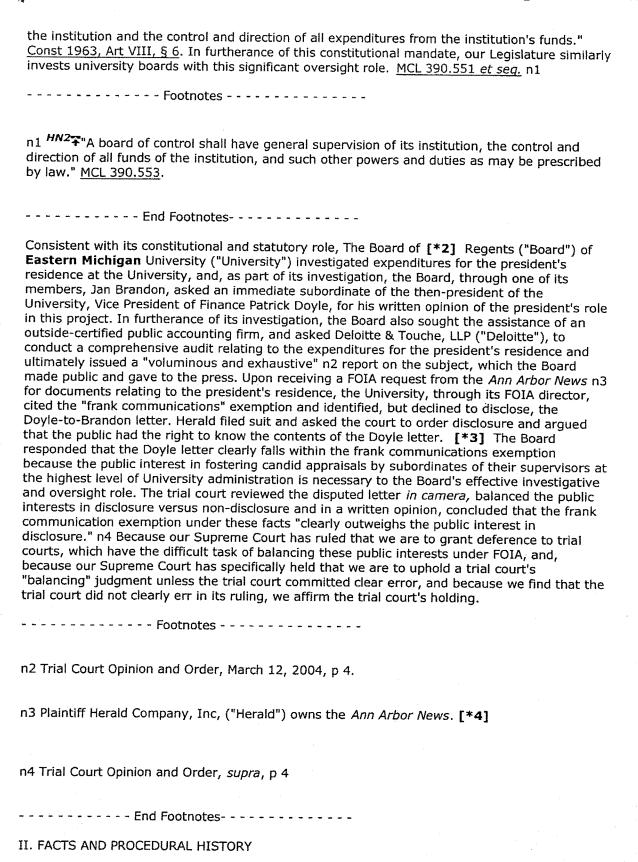
JUDGES: Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

OPINIONBY: Henry William Saad

OPINION: SAAD, J.

I. NATURE OF THE CASE

*The Michigan Constitution confers enormous responsibility and authority on boards of public universities: our Constitution grants to boards of public universities the "supervision of



As part of the Board's investigation into alleged overexpenditures for the president's residence, in the summer of 2003, Jan Brandon, a member of the Board, requested a letter from University Vice President of Finance Patrick Doyle regarding the construction of the president's house. In particular, Brandon desired to learn more about the University president's role in the construction project. There was a controversy regarding construction costs, and the Board needed information to aid it in determining the appropriate course of action. Doyle's letter, dated September 3, 2003, contained his candid appraisal of the conduct of the president regarding the construction.

On September 10, 2003, Herald sent the Board an FOIA request for documents relating to the construction of the president's residence. Citing \underline{MCL} 15.243(1)(\underline{m}), the Board's FOIA coordinator provided the following written explanation for the Board's refusal to provide a copy of the Doyle letter in response to Herald's FOIA request:

Please [*5] be advised that [EMU] has identified one other document which may be within the scope of your September 10, 2003 [FOIA] request. The document is a September 3, 2003 letter from Patrick Doyle to EMU Regent Jan Brandon. Pursuant to Section 13(1)(m) [MCL 15.243(1)(m)] of the Michigan FOIA, EMU is denying your request for this letter as the letter is a communication/note within the public body EMU of an advisory nature covering other than purely factual material and preliminary to a final agency decision. Further, EMU has determined that in this particular instance the public interest in encouraging frank communications between officials and employees of EMU clearly outweighs the public interest in disclosure.

Thereafter, Herald brought this suit, and asked the trial court to review the Doyle letter *in camera* and order its disclosure. Herald claimed, *inter alia*, that the claimed public interest in encouraging frank communications between public officials and employees did not clearly outweigh the public interest in disclosure because "the Doyle letter speaks to critical issues involving the President's financial accountability and his management style."

In its response [*6] to Herald's motion, the Board indicated that the Doyle letter was requested by Regent Brandon "to assist her in determining the appropriate course of action for [the Board] to take during the early stages of the controversy," and that the letter was "used as part of the deliberative process that [the Board] engaged in, through its individual members, to determine its course of action in the University House matter."

In light of these facts, the Board argued that the Doyle letter should be considered exempt from disclosure under MCL 15.243(1)(m) because it was an advisory communication from a subordinate regarding a superior, preliminary to a "final determination of action" by the Board, and the public interest in encouraging frank communication between officials and employees of the University clearly outweighed the public interest in disclosure. n5 The Board also argued that its publication of "a voluminous and exhaustive report on the investigation into the University House controversy," prepared by an independent auditing firm, Deloitte, weighed against disclosure of the Doyle letter. The Board asserted that all the facts had been released and were part of the public record, [*7] but that the opinions and personal views of Doyle, which were part of the deliberative process of the Board, should be protected from disclosure.

n5 The Board also emphasized that the Doyle letter includes "opinions and comments that could reflect on Mr. Doyle's immediate superior, the University president," and that if Doyle had known the letter would be made public, "he would be much more likely to be circumspect and cautious in his communication."

----- End Footnotes------

The trial court held a hearing, reviewed the Doyle letter *in camera*, and denied Herald's motion to compel disclosure of the Doyle letter and granted summary disposition in favor of the Board, and held that the letter fell within the FOIA exemption provided by MCL 15.243(1)(m). The trial court stated:

In the opinion of the Court, Defendant has sufficiently articulated a particularized justification for exemption under [MCL 15.243(1)(m)]. Based on its *in camera* review of the letter, the Court finds that: (1) the contents are of an advisory nature and [*8] cover other than purely factual materials; (2) the communication was made between officials and/or employees of public bodies; and (3) the communication was preliminary to a final agency determination of policy or action.

Although the document contains some "factual material," it is primarily a summary of events from Doyle's perspective. Any factual material contained in the letter is not easily severable. Doyle clearly exercised judgment in selecting the factual material, evaluating its relative significance, and using it to facilitate the impact of his opinions. See, Montrose Chemical Corp v Train, 160 U.S. App. D.C. 270, 491 F.2d 63 (DC Cir, 1974) (Federal Court held that two factual summaries of evidence developed at a hearing before the Administrator of the EPA were exempt under a parallel provision of the federal FOIA). Further, under recent persuasive Michigan authority, a court may determine that a particular document that contains substantially more opinion that fact" falls within the exemption. Barbier v Basso, 2000 Mich. App. LEXIS 2560, 2000 WL 33521028 (Mich App). [Trial Court Opinion and Order, supra, pp 3-4.]

The trial court further [*9] ruled that the letter was exempt from disclosure under "the parameters set forth in *Herald Co, Inc v Ann Arbor Public Schools*" n6 and made the following findings:

- (1) The letter contains substantially more opinion than fact, and the factual material is not easily severable from the overwhelming majority of the comments: Doyle's views concerning the President's involvement with the University House project.
- (2) The letter is preliminary to a final determination of policy or action. The communication was between officials of public bodies. The letter concerns [the Board's] investigation and ultimate determination of what action, if any, would be taken regarding the University House controversy.
- (3) The public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure. [Herald's] specific need for the letter, apparently to "shed light on the reasons why a respected public official resigned in the wake of [the University] being caught misleading the public as to the true cost of the President's house," or the public's general interest in disclosure, is outweighed by [the Board's] interest [*10] in maintaining the quality of its deliberative and decision-making process.
- (4) [The Board] conducted an investigation and recently published a "voluminous and exhaustive report" concerning its findings regarding the University House

project, a copy of which was furnished to [Herald]. [Trial Court Opinion and Order, supra at 4.]						
ð						
n6 Herald Co, Inc v Ann Arbor Public Schools, 224 Mich. App. 266; 568 N.W.2d 411 (1997).						
End Footnotes						
This Court denied Herald's motion for peremptory reversal, but granted its motion for immediate consideration and ordered this appeal to be expedited. This Court also directed the Board to file a copy of the Doyle letter with this Court and the Clerk to "suppress the letter from public view upon receipt."						
III. STANDARD OF REVIEW						
Our Supreme Court's decision in <u>Federated Publ'ns, Inc v City of Lansing</u> , 467 Mich. 98; 649 N.W.2d 383 (2002), provides HN3 the rule of law and the rationale for the appropriate level of deference we are [*11] to give to trial courts that conduct the difficult and fact sensitive balancing tests under FOIA. In an opinion authored by Justice Markman, our Supreme Court observed that the standard of review for FOIA cases is not contained in the legislation itself, but in "our case law." n7 Specifically, the Court held that:						
Exemptions involving discretionary determinations such as application of the instant exemption requiring a circuit court to engage in a balancing of public interests, should be reviewed under a deferential standard. We therefore hold that the clearly erroneous standard of review applies to the application of exemptions requiring determinations of a discretionary nature. A finding is "clearly erroneous" if, after reviewing the entire evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made. [Federated Publications, supra at 106-107 (emphasis added).]						
n7 <u>Federated Publ'ns, supra at 106</u> .						
End Footnotes [*12]						
Our Supreme Court in <i>Federated Publications</i> emphasized that as trial courts carry out the "public interest balancing," each case, with its special facts, will implicate "differing public interest considerations." n8 Equally important, our Supreme Court ruled that "in undertaking this balancing, however, the circuit court must consider the fact that the inclusion of a record within an exemptible class implies some degree of public interest in the non-disclosure of such a record." <i>Federated Publ'ns</i> , <i>supra</i> at 109. Importantly, the Court further observed:						
Fastantan						

7 of 29

n8 <u>Federated Publ'ns, supra at 109</u> .						
That is, some attribute of these records has prompted the Legislature to designate them as subject to disclosure only upon a finding that the public interest in disclosure predominates. [Id.] n9						
n9 And, here, with respect to the frank communication exemption, the public interest in frank communication must clearly outweigh the public interest in disclosure. MCL 15.243(1)(m).						
End Footnotes [*13]						
In other words, our Supreme Court in <u>Federated</u> reasoned that HN4* though FOIA's disclosure policy serves the public interest in good governance, our Legislature made clear, in the same legislation, that the public interest in good governance may also be served by the non-disclosure policy illustrated by specific exemptions:						
In performing the requisite balancing of public interests, the circuit court should remain cognizant of the special consideration that the Legislature has accorded an exemptible class of records. [Federated Publ'ns, supra at 110.]						
Accordingly, the relevant inquiry under <u>Federated Publications</u> is whether the trial court's ruling constitutes clear error.						
IV. ANALYSIS						
HN5**Under federal and state freedom of information acts ("FOIAs"), the public has a broad right to inspect government documents, and the general policy promoted is one of "full disclosure." **Swickard v Wayne Co Medical Examiner, 438 Mich. 536, 543; 475 N.W.2d 304 (1991). This right to review documents under FOIA promotes the public interest in good government. n10 Yet, our Legislature clearly determined that there are certain [*14] circumstances where revealing information would undermine rather than further good governance. n11 Hence, the public's right to view government documents is conditional, and FOIA contains specific exemptions that qualify, and in certain cases, override the right to disclosure.						
n10 See <u>Dept of Justice v Reporters Comm for Freedom of Press</u> , 489 U.S. 749, 770-773; 109 S. Ct. 1468; 103 L. Ed. 2d 774 (1988).						

n11 "In contrast with the universe of public records that are non-exemptible, the Legislature has specifically designated [certain] classes of records as exemptible." Federated Publ'ns, supra

<u>at 109</u> .			
End Footnotes			
A. THE PURPOSE OF THE FRANK COMMUNICATIONS EXEMPTION			
The quality of a governmental decision is only as good as the information that informs it, and, accordingly, it is widely recognized that the public has a strong interest in promoting frank communications between government officials as evidenced by numerous state laws that contain exemptions [*15] for information falling into this category. n12			
n12 See What Constitutes Preliminary Drafts or Notes Provided by or for State or Local Governmental Agency, or Intra-Agency Memorandums, Exempt From Disclosure or Inspection Under State Freedom of Information Acts, <u>26 ALR4th 639</u> .			
End Footnotes			
One example is the federal FOTA, which contains a broad exemption for "inter-agency or			

That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear. The precise contours of the privilege in the context of this case are less clear, but may be gleaned from expressions of legislative purpose and the prior case law. The cases uniformly rest the privilege on the policy of protecting the "decision making processes of [*16] government agencies," The point, plainly made in the Senate Report, is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decisions" and "policies formulated" would be the poorer as a result. As a lower court has pointed out, "there are enough incentives as it is for playing it safe and listing with the wind," and as we have said in an analogous context, "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances. . . to the detriment of the decision making process." [NLRB v Sears, Roebuck & Co, 421 U.S. 132, 150; 95 S. Ct. 1504; 44 L. Ed. 2d 29 (1975) (internal citations omitted).]

intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 USC 552(b)(5). The United States Supreme Court

articulated the reason for the frank communication exemption:

State courts have expressed similar reasoning. The "deliberative process" exemption to New York's FOIA "was enacted to foster open and candid discussion among public officials and to protect uninhibited recommendations, made within the family, from being scrutinized by those affected and by the public." Shaw v. Lerer (In the Matter of Shaw), 112 Misc. 2d 260, 446 N.Y.S.2d 855, 856 (NY S. Ct. 1981). [*17] In Shaw, the plaintiff, a high school referee, sued to obtain rating reports which had been compiled on him by high school coaches. The court held that the reports fell within the exemption, and thus did not have to be disclosed:

9 of 29

It is not only preferable but imperative that the individual ratings remain private because disclosure would be extremely detrimental to the public interest. A public dissemination of the ratings would temper an honest and free evaluation with fear of reprisals and animosity and deter a proper decision.

In the instant case the rating process provides useful advisory opinions which would become meaningless or nonexistent if the cloak of confidentiality were to be removed. The coaches and officials would hesitate to participate in any rating process which would be made public and any rating made under such circumstances would reflect more concern for its public acceptance than for its actual truth. The inevitable result would be an interference with the true sportsmanship of scholastic events and a detrimental impact upon the public's interest and participation in public high school functions. The potential harm to the public interest far outweighs [*18] any possible benefit to the single participant. If disclosure is more harmful to the public than nondisclosure is harmful to the person seeking the information, the scales of justice must tip toward nondisclosure. *Public welfare is more important than public knowledge*. [Shaw, supra at 856 (internal citations omitted) (emphasis added).]

B. THE MICHIGAN FRANK COMMUNICATIONS EXEMPTION

Michigan also recognizes that the public has a strong interest in promoting frank communications between government officials.

The Michigan Legislature determined that **HN6** the public's interest in promoting frank communications necessary to the proper functioning of government, may at times, outweigh the disclosure policy of the FOIA, and thus included a specific exemption in the FOIA for:

Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and [*19] employees of public bodies clearly outweighs the public interest in disclosure. $[\underline{MCL 15.243(1)(m)}.]$

This exemption explicitly recognizes that there are special cases where nondisclosure better serves the public's interest in good governance. The exemption forces courts to view the big picture, and ask whether the public interest in the disclosure of a particular piece of information may be clearly outweighed by certain decision-making realities where the disclosure would ultimately frustrate the goal of good governance. n13

n13 In the context of discovery, Michigan also recognizes a privilege for "'confidential intraagency advisory opinions,' based on a policy of protecting 'open, frank discussion' concerning governmental action." *Ostoin v Waterford Township Police Dep't*, 189 Mich. App. 334, 338; 471 N.W.2d 666 (1991), quoting *Kaiser Aluminum & Chemical Corp v US*, 141 Ct. Cl. 38, 157 F. Supp. 939, 944-947 (Ct Cl, 1958).

----- End Footnotes-----

We note also that Michigan's frank [*20] communication exemption is narrower than the federal exemption. The federal exemption contains an implicit presumption that the value of promoting frank communications is such that it outweighs the public's right to know. However, the Michigan exemption is more limited: in order to prevent disclosure, the government must not only show that disclosure would inhibit frank communications, it must articulate why the promotion of frank communications, "in the particular instance," "clearly" outweighs the public's right to know.

Therefore, HN7* to conduct its analysis under MCL 15.243, the trial court will ask and answer these questions: (1) did the public body show that the requested document covers "other than purely factual materials;" (2) did the public body show that the document is "preliminary to a final agency determination of policy or action;" and (3) did the public body "establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure." The Herald Co v Ann Arbor Public Schools, 224 Mich. App. 266, 274; 568 N.W.2d 411 (1997). Herald concedes the first [*21] and second points, but challenges the University's position and the trial court's ruling on the third point.

C. THE "CLEARLY OUTWEIGHS" STANDARD

1. Michigan

In <u>McCartney v Attorney General</u>, 231 Mich. App. 722; 587 N.W.2d 824 (1998), this Court balanced the applicable public interests and applied the "clearly outweighs" standard. In <u>McCartney</u>, the plaintiff sought the release of memoranda prepared by the Attorney General's staff regarding the Governor's negotiations with Indian tribes over casino rights. The defendant argued, inter alia, that the memoranda were protected by the frank communications exemption. The Court agreed, and specifically affirmed the following argument:

The large number of assistants and divisions, the diverse location of the divisions, the vast number of matters under consideration at any given moment, the pressure of court imposed deadlines, and the need to fully consider and evaluate various concerns make it absolutely essential that the Department of Attorney General utilize written memoranda as a means of communication to assist in decision making.

The release to the public of the internal memoranda of [*22] the type at issue in this case would discourage the preparation of such memoranda and would impact negatively on the quality of the department's decision-making process with detrimental effect on the legal services provided to state agencies as well as on the public's interest. [Id. at 734-35.]

This Court in <u>Favors v Dept of Corrections</u>, 192 Mich. App. 131; 480 N.W.2d 604 (1991), also applied the clearly outweighs standard. The plaintiff, an inmate, sought to obtain a review form, which was used to determine disciplinary credits. The form contained a sheet used to record the committee's comments, which were then used to make a final decision. This Court noted that:

The comment sheet is designed to allow the committee members to state their candid impressions regarding the inmate's eligibility for disciplinary credits. Release of this information conceivably could discourage frank appraisals by the committee and, thus, inhibit accurate assessment of an inmate's merit or lack thereof. [Id. at 135.]

20,000 = 15.00

This Court then went on to hold that the public interest in nondisclosure clearly outweighed the interest in disclosure, because:

The **[*23]** public interest in encouraging frank communications within the Department of Corrections clearly outweighs the public interest in disclosure of these worksheet forms. The public has a clear interest in encouraging the members of disciplinary credit committees within the department to communicate frankly with a warden with regard to the issue of inmate disciplinary credit, an issue that affects the length of an inmate's incarceration. The public has a far greater interest in insuring that these evaluations are accurate than in knowing the reasons behind the evaluations. [Id. at 136 (emphasis added).]

HN87When, as here, the public body makes the proper showing that good governance is better served by nondisclosure rather than disclosure, it will not be required to release the information. To make the proper showing, the public body must show that the information falls in the frank communications exemption, and that nondisclosure clearly outweighs the public's interest in disclosure.

<u>McCartney</u> demonstrates how and why this balancing of public interests may favor nondisclosure. The goal of the communications in <u>McCartney</u> was the provision of accurate legal advice, **[*24]** undeniably a matter of great importance. Likewise, the nature of the communications, legal advice, is a sensitive subject that normally requires confidentiality. Because the communications in <u>McCartney</u> were of a type generally recognized as requiring confidentiality, and were directed towards an important goal, the public interest in nondisclosure greatly outweighed the interest in disclosure. <u>Favors</u> also shows how the specific nature of the communications can justify nondisclosure. If the committee members knew that the inmates would view their comments, they would understandably be less candid in their appraisal of the inmates. Furthermore, their candid comments were invaluable to the warden's final determination: the warden could not be expected to keep track of and evaluate every inmate himself, thus he relied on the candid comments of the committee members.

2. California

Another jurisdiction that uses a "clearly outweighs" standard is California. The California FOIA contains a provision the allows the public body to withhold disclosure of a document if "on the facts of a particular case the public interest served by not making the record public clearly outweighs [*25] the public interest served by disclosure of the record." Cal Gov't Code 6255. The court analyzed this frank communication exemption in Times Mirror Co v Superior Court of Sacramento County, 53 Cal.3d 1325; 813 P.2d 240, 283 Cal. Rptr. 893 (1991). The plaintiff sought to obtain copies of the Governor's appointment schedules. The Governor argued that disclosure would interfere with his decision-making process, since "disclosure of the records in question, which identify where, when and with whom he has met, would inhibit access to the broad spectrum of persons and viewpoints which he requires to govern effectively." *Id.* at 1339. The California Supreme Court first noted that the public had a strong interest in the disclosure of the schedules. "In politics, access is power in its purest form. Entrance to the executive office is the passport to influence in the decisions of government. The public's interest extends not only to the individual they elect as Governor, but to the individuals their Governor selects as advisors." Id. at 1344. The court also noted that public exposure could expand, rather than limit, the variety of people the Governor met [*26] with. Id. at 1345. With the goal of promoting good government, the court ultimately concluded that:

The answer to these arguments is not that they lack substance, but pragmatism. The deliberative process privilege is grounded in the unromantic reality of politics; it rests on the understanding that if the public and the Governor were entitled to precisely the same information, neither would likely receive it. Politics is an ecumenical affair; it embraces persons and groups of every conceivable interest: public and private; popular and unpopular; Republican and Democratic and every partisan stripe in between; left, right and center. To disclose every private meeting or association of the Governor and expect the decision making process to function effectively, is to deny human nature and contrary to common sense and experience. [Id. (emphasis added).]

Thus, the court held that "the public interest in nondisclosure clearly outweighs the public interest in disclosure." *Id.*

3. Application to the Doyle Letter

Because the goal of both FOIA and its exemptions is good government, not disclosure for disclosure's sake, our Legislature, by placing the frank [*27] communication exemption within FOIA, made the policy judgment that "public welfare is more important than public knowledge." n14 That is, the public has a far greater interest in insuring that boards of public universities provide effective oversight of the administration's expenditure of public funds than knowing the opinions of one administrator about another. The Board needs more than cold and dry data to do its job, it needs the unvarnished candid opinion of insiders to make policy judgments and particularly to conduct sensitive investigations of top administrators. And, when a high level administrator is asked to give his opinion of the highest ranking official in the administration, the president, his immediate superior, whose favor he needs for job security, the insider may be naturally reluctant to trust the outsider and to trust the confidentiality of the communication. Also, not unimportantly, the outside board member, in assessing the advisability of conducting further and more exhaustive investigations into alleged over-expenditures for the president's residence, must assess the reliability, credibility, and validity of such communications. In other words, these frank communications [*28] are essential to an outside board's ability to discharge its vital constitutional oversight function on behalf of the public. There is a substantial risk that these vital sources of candid opinions would dry up were insiders justifiably fearful that their candid appraisals would make front-page headlines. This is especially true where, as here, the Board is investigating potential misconduct of a high-ranking official and seeks the insight of other high-ranking officials who work for and side-by-side with the target of the investigation. The natural human tendency to "circle the wagons" or "play it safe," coupled with apprehension of retaliation if the written opinion is made public, would, we fear, deprive the Board of an important perspective:

The point, plainly made in the Senate Report, is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decisions" and "policies formulated" would be the poorer as a result. As a lower court has pointed out, "there are enough incentives as it is for playing it safe and listing with the wind," and as we have said in an analogous context, "human experience teaches [*29] that those who expect public dissemination of their remarks may well temper candor with a concern for appearances. . . to the detriment of the decision making process." [Sears, Roebuck & Co, supra at 150 (internal citations omitted).]

Search - :	2 Results - eastern michigan and whitbeck	http://www.lexis.com/research/retrieve?_m=d57331c08a59be53ddd8
٠		
	n14 In the Matter of Shaw, supra at 856.	
	End Footnotes	
	this context, kill the goose that layed the g	nurt, not advance, the public interest. It would, in golden egg, because, to paraphrase the California if are entitled to receive exactly the same information, mes Mirror Co, supra at 1345.
	in derogation, of its constitutional role. The public, it did not conceal and sweep the issemble president himself concealed documents complicity of the Board, then the balancing making would clearly weigh in favor of discinsiders' opinions to investigate other inside	atroverted fact that the Board acted in fulfillment, not at is, the Board investigated and reported to the sue under the rug. n15 Had this been a case where is [*30] to hide his alleged misconduct, with the grof public policy interests and the calculus of decision closure. But, where, as here, the Board needs ers to protect the use of public funds and, where the the public interest in nondisclosure clearly

n15 In a case involving the federal FOIA, the DC Court of Appeals held that the availability of the facts in question from another source was a factor weighing against disclosure. "Our case here is to be distinguished from a situation in which the *only* place certain facts are to be is in the administrative assistants' memoranda. Here *all* the facts are in the public record." *Montrose Chemical Corp of California v Train*, 160 U.S. App. D.C. 270, 491 F.2d 63, 70 (CA DC 1974). [*31]

predominates. Indeed, this factual scenario strikes us as the prototype the Legislature had in mind when it adopted the "frank communication" exemption in FOIA. The express recognition by the Legislature of the need for candor and its vital role in internal decision making and internal investigations n16 gave birth to the "frank communications" exemption and were we to hold this exemption inapplicable under these facts, this may very well sound the death knell of this vital tool for board members to discharge their oversight roles for the benefit of the public.

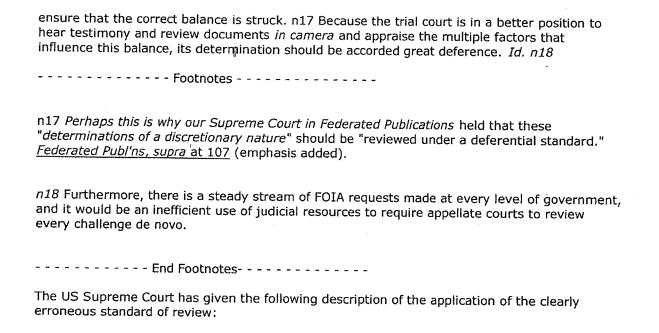
n16 Indeed, arguably, the need for candor is even greater with respect to internal investigations of allegations of wrongdoing than it is for day-to-day policymaking.

D. THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW

Because we agree with the trial court that the public interest in protecting frank communications clearly outweighs the interest in disclosure, a fortiori, we conclude that the trial court did not commit clear error by so ruling. And because our Supreme Court instructs us to use the clearly erroneous standard when we review a trial court's balancing judgment, we hold that the trial court did not clearly err in ruling that the public interest in nondisclosure predominates here. Indeed, the clearly erroneous standard was adopted by our Supreme Court to provide deference to trial courts that engage in precisely the type of balancing of public interests conducted here. <u>Federated Publ'ns, supra at 105-107</u>. There is often a delicate balance between the public interest in disclosure and the public interest in nondisclosure. The trial court must make a careful [*32] appraisal of the special circumstances and all relevant facts to

11 of 20

3/3/2005 5:15 DM



Although the meaning of the phrase "clearly erroneous" is not immediately apparent, [*33] certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that HN9 T"[the] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would [*34] have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. [Anderson v Bessemer City, 470 U.S. 564, 573-574; 105 S. Ct. 1504; 84 L. Ed. 2d 518 (1985) (internal citations omitted) (emphasis added)].

Also, in colorful language adopted from the Seventh Circuit, the Michigan Supreme Court has stated: "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish." People v Cheatham, 453 Mich. 1, 30 n 23; 551 N.W.2d 355 (1996), quoting Perts & Electric Motors, Inc v Sterling Electric, Inc, 866 F.2d 228, 233 (CA 7, 1988).

V. RESPONSE TO DISSENT

Among the many misstatements, misapprehensions, and mischaracterizations contained in the dissent, the most glaring flaw in the dissent's reasoning is the dissent's failure to properly apply the principles regarding standard of review, enunciated by our Supreme Court in <u>Federated</u>

Publications, to the trial court's role in [*35] balancing of public interests required by MCL 15.243(1)(m). While inaccurately accusing the majority of ignoring the "clearly outweighs" standard to determine when disclosure trumps non-disclosure, the dissent ignores our Supreme Court's express review limitations articulated in Federated Publications. That is, our Supreme Court in Federated made it abundantly clear not simply in that case, but in any case HN107 where a trial court makes "discretionary determinations" involving "balancing of public interests" that we are not to disturb the trial court's findings simply because we may disagree (as the dissent clearly does). Rather, we may overrule the trial court only when the trial court "clearly" errs. The dissent overstates the clearly outweighs standard under FOIA beyond its intended meaning to accomplish the dissent's purpose of overruling the trial court because it disagrees with the trial court. At the same time, to accomplish the dissent's purposes here, the dissent relegates our Supreme Court's mandated "clearly erroneous" standard to something much less than our Supreme Court intended. In doing so, the dissent falsely accuses the majority of positing a balance between disclosure [*36] for disclosure's sake versus good government. This is simply wrong. Rather, the majority simply makes the observation that it was not we, but our Legislature who, by creating the "frank communications" exemption, determined that good governance in limited cases may be better served by non-disclosure than by disclosure in order to encourage the very kind of successful investigation that we witness here. Moreover, the dissent mistakenly accuses the majority of conflating the clearly erroneous standard with the abuse of discretion standard. The simple answer is that we do not conflate or confuse the two standards. Instead, we simply note the concrete fact that it was not we, but our Legislature, who determined that there are clear exceptions to disclosure when non-disclosure clearly outweighs the public interest in disclosure. And, equally important and compelling to our analysis is our Supreme Court's holding and teaching in Federated that "exemptions involving discretionary determinations . . . requiring a circuit court to engage in a balancing of public interests, should be reviewed under a deferential standard." It is this admonition that the dissent ignores. And, contrary to [*37] the dissent's hyperbolic accusations, we do not invent the standard of review. Rather, our Supreme Court simply articulated the standard of review in Federated. Simply because the balancing here requires the trial court to find that one interest "clearly" outweighs another, does not render meaningless the obvious proposition that the trial court's job - weighing one interest against another in light of all the facts of the particular case - remains one of conducting a balancing test. That the frank communications exemption carries with it a "clearly outweighs" mandate, which is obvious, nonetheless leaves the trial court with the discretionary job of weighing public interests and leaves us, as a reviewing court, with the obligation to review the trial court's ruling using what Federated tells us is a "deferential standard." As our Supreme Court makes clear in Federated, "some attribute of these records," here records that fall within the category of frank communications, prompted our Legislature to give them "special consideration" - to make them subject to special treatment (unlike public records falling outside any exemptible class) as an "exemptible class of records. [*38] Throughout the dissent, we observe that the dissent prefers to minimize the "clearly" in the clearly erroneous standard of review and to inflate the "clearly" in clearly outweighs of FOIA to effectuate the dissent's objectives.

Moreover, the dissent, again inaccurately and unfairly, accuses the trial court and the majority of balancing the public interests and reviewing the trial court's balancing decision, respectively, contrary to the Legislative mandate, by ignoring the language, "in the particular instance." To support this unfair characterization, the dissent accuses the majority of speculating about facts (which we do not) while the dissent itself speculates about the meaning of some of Doyle's statements in his letter (speculation that is, in our view, naive).

Again, the dissent is simply wrong. Both we and the trial court make our respective rulings with the particular facts of this case at the center of our analysis. Indeed, in its opinion, the trial court said that defendant articulated "a particularized justification." Further, the trial court's opinion goes into very specific detail regarding its reasoning and its basis for its holding "in this particular instance. [*39] " Significantly, we conduct our review of the trial court's review with special emphasis on this particular instance. Unlike the dissent, we cannot and do not speculate on: (1) why Doyle wrote what he did; (2) when he wrote the letter; (3) whether

Doyle is credible to the Board in his opinions; (4) how the Board may have judged his credibility, reliability, or sincerity; or (5) what the Board may have known about the relationship between Doyle and the University president and how this impacted on their decision regarding further investigations. This is for the constitutionally mandated board to sort out, not us. The Michigan constitution gives the Board, not us, the very difficult job of protecting the public interests by ensuring that public funds are properly spent. And here, there is no question that the Board was able to discharge its duty due in no small part to its ability to obtain the opinions and assessments of insiders about other insiders, information that the Board may not have obtained absent the frank communication exception. The management of this very sensitive mix of an outside board, insiders' opinions about other insiders, and the weighing of motivations and credibilities [*40] in a delicate balancing of investigations is the constitutional charge of the Board, not judges. It is this delicate balancing of interests that creates the unique "particular instance" here that informed the trial court's well-reasoned, and correct, in our view, and most certainly not "clearly erroneous" decision under the frank communication exemption.

VI. CONCLUSION

Here, in balancing the public interests, the trial court determined that the Board's important, constitutional oversight function and investigative role, and thus, the public interest in good government, would be better served by nondisclosure rather than disclosure of the Doyle letter. In so finding, the trial court did not clearly err.

For all the foregoing reasons, we hold that the trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

DISSENTBY: WHITBECK

DISSENT:

WHITBECK, C.J. (dissenting).

This case arises from the construction of a new official residence, the University House, for the president of **Eastern Michigan** University (the University). Apparently, there was considerable public controversy regarding the expenditures associated with [*41] the University House and ultimately the president resigned, perhaps because of this controversy. In any event, it is clear from the record that University Regent Jan Brandon wrote a letter to Patrick Doyle, the University's vice president for finance, asking Mr. Doyle to address several questions relating directly or indirectly to the construction of the University House. On September 3, 2003, Mr. Doyle responded by letter and it is this communication (the Doyle letter) that is at issue here. Plaintiff Herald Company n1 sought to obtain a copy of the Doyle letter, the University denied the request based upon the "frank communications" exception n2 of the Freedom of Information Act (the FOIA), n3 the Herald Company sued, and the trial court upheld the University's denial, as does the majority here.

n1 Doing business as Booth Newspapers, Inc. and the Ann Arbor News.

n2 MCL.15.243(1)(m).

n3 MCL 15.231, et seq.
End Footnotes
I respectfully dissent from the majority's opinion. In construing the frank communications [*42] exemption of the FOIA the majority has posited a false choice between "good government" on the one hand and "disclosure for disclosure's sake" on the other. The FOIA contains no such choice but, by reading it into the statute, the majority assures that the contents of the Doyle letter will remain secret. In the process, the majority ignores the concept of accountability that is so essential to the process of governing. It disregards the requirement in the frank communications exemption that the public body must show in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. It articulates what amounts to an abuse of discretion standard for appellate court review of FOIA cases. It speculates as to what may occur in the future under the guise of construing the frank communications exemption while ignoring facts that are, in my view, outcome determinative in the particular circumstances of this case. And finally, relying on a New York case, it reaches the amazing conclusion that "public welfare is more important than public knowledge." In the process, the [*43] majority overlooks the fundamental proposition that in a democracy public knowledge is essential to public welfare and ignores the explicit public policy statement in the FOIA that "the people shall be informed so that they may fully participate in the democratic process." n4 For these reasons, I dissent.
n4 <u>MCL 15.231(2)</u> .
End Footnotes
I. Overview: Accountability And The Process Of Governing
Chess is a game of perfect information. n5 In a chess game, each player looks at the board and sees the same information and that information is all that is available. By contrast, poker is a game of partial information. In a stud poker game, for example, all players have some information that they share equallythat is, knowledge of the cards that have been dealt face upbut each player also has some information unique only to that playerthat is, knowledge of the cards that are in that player's hand.
n5 McManus, Positively Fifth Street: Murderers, Cheetahs, and Binion's World Series of Poker (New York: Farrar, Straus & Giroux, 2003).
End Footnotes [*44]
The game of poker is more analogous to real life than is the game of chess, which may account for poker's significantly greater popularity. As individuals within a larger society, we rarely have

exactly the same information and almost never do we have all the information that exists. The decisions that we make, therefore, may depend as much upon past experience, upon intuition,

upon context, and upon our own value systems as they do upon factual information.

The process of governing is a real life exercise and, while it is most certainly not a game, it is an exercise characterized by partial information. Rarely do individual citizens have the same information about governmental decisions. Almost never do such citizens have all the information that exists. In part, this is inevitable. Although the direct democracy of the town meeting still exists in a few areas, we now largely function within a representative form of government in which elected and appointed officials make decisions on our behalf without our participation and, indeed, often without our knowledge.

Nonetheless, as citizens we must be able to hold our elected and appointed officials accountable for the decisions that [*45] they make on our behalf. Accountability, in turn, depends on information; we cannot make an informed judgment about whether a decision of a government official was the correct one without having at least some information about that decision. In 1976, the Michigan Legislature took a decisive step toward regularizing the access that citizens have to information about governmental decision-making and, thereby, toward ensuring accountability by elected and appointed governmental officials. That step was the passage of the FOIA.

The first section of the FOIA spells out a policy that would appear to be premised upon the concept of perfect information:

It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to *full and complete information* regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.[n6]

n6 MCL 15.231(2) (emphasis supplied).
[*46]
The mechanisms of the FOIA, however, do not actually result in the provision of full and complete information in all instances. Section 13 n7 of the FOIA currently contains 25 discrete exemptions from the broad sweep of the Act. The inclusion of such exemptions reflects a whole realistic series of policy decisions by the Legislature that, sometimes, full disclosure would not advance the process of governing. Court after court, however, has said that these exemptions are to be construed narrowly. n8
Footnotes
n7 <u>MCL 15.243</u> .

n8 See, for example, <u>Detroit Free Press</u>, <u>Inc v Dep't of Consumer and Industry Services</u>, <u>246 Mich. App. 311</u>; <u>631 N.W.2d 769 (2001)</u> (the exemptions in the FOIA are narrowly construed, and the party asserting the exemption bears the burden of proving that the exemption's applicability is consonant with the purpose of the FOIA); <u>Herald Co v City of Bay City</u>, <u>463 Mich. 111</u>; <u>614 N.W.2d 873 (2002)</u> (the FOIA is a pro-disclosure statute, and its exemptions are narrowly construed); <u>Kent County Deputy Sheriffs' Ass'n v Kent County Sheriff</u>, <u>238 Mich. App. 310</u>; <u>605 N.W.2d 363 (1999)</u> (the FOIA is interpreted broadly to allow public access, and its exceptions are interpreted narrowly so its disclosure provisions are not undermined).

			-	-	~	-	-	-	-	-	-	End	Footnotes-	-	-	-	-	-	-	-	-	-	-	-	-	-	[*	4	7]
--	--	--	---	---	---	---	---	---	---	---	---	-----	------------	---	---	---	---	---	---	---	---	---	---	---	---	---	----	---	---	---

Further, there can be no question that the concept of accountability is central to both the broad policy and the implementing mechanisms of the FOIA. n9 The FOIA, then, is a pro-disclosure statute that by its enactment sought to expand access to information in the hands of government officials. Thereby it allows the citizens of this state to hold those officials accountable for the decisions that they make on our behalf. While the Legislature did not, and could not, provide for complete access to information, it did significantly shift the balance away from restricted access to open access in all but a restricted number of instances. The Legislature therefore necessarily made the decision that disclosure, except in a limited number of instances, facilitates the process of governing because it incorporates the concept of accountability.

----- Footnotes ------

n9 See, for example, *Detroit Free Press v City of Warren*, 250 Mich. App. 164; 645 N.W.2d 71 (2002) (under the FOIA, citizens are entitled to obtain information regarding the manner in which public employees are fulfilling their public responsibilities); *Manning v City of East Tawas*, 234 Mich. App. 244; 593 N.W.2d 649 (1999) (the FOIA is a manifestation of the state's public policy recognizing the need that public officials be held accountable for the manner in which they perform the duties); *Thomas v City of New Baltimore*, 254 Mich. App. 196; 657 N.W.2d 530 (2002) (the FOIA was enacted recognizing the need for citizens to be informed so that they may fully participate in the democratic process and thereby hold public officials accountable for the manner in which they discharge their duties).

------ End Footnotes----- [*48]

This was a deliberate, reasoned policy choice and one to which we in the judiciary should, in the process of judicial review, defer. In my view, the majority here exhibits no such deference. Rather, the majority substitutes its own view of proper policy--that the process of governing would be *hindered* in the context of the "frank communications" exemption by providing access to the Doyle letter--on grounds that are suspect at best when the actual language of that exemption is examined.

II. The Frank Communications Exemption

Section 13(1)(m) n10 of the FOIA is the frank communications exemption. The frank communications exemption contains, first, a description of the public documents that are to be exempted and, second, a requirement for a necessary showing for the exemption to apply. The description of the public documents to be exempted provides that such documents must be (1) communications and notes within a public body or between public bodies, (2) other than purely factual materials, and (3) preliminary to a final agency determination of policy or action. The trial court found, and I agree, that the Doyle letter at issue here met each of these three prongs.

n10 *Id.*

The necessary showing requirement is, however, another matter. Section 13(1)(m) states that "this exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." (Emphasis supplied). Thus, the public

body claiming exemption must show with particularity how the public interest in encouraging frank communications clearly outweighs the overall public interest in disclosure.

It is within the context of this language that I find the majority's reliance on the "public interest balancing" mentioned *Federated Publications* n11 to be, at the very least, interesting. It is clear from the case law, including *Federated Publications*, that applying the FOIA of necessity requires balancing of the interest in disclosure versus the interest in non-disclosure. However, in the frank communications exemption the Legislature, in a manner of speaking, put its thumb on the scale. The Legislature placed the burden squarely on the public body to show that the interest in non-disclosure *clearly outweighs* the [*50] interest in disclosure. In addition, the Legislature provided that this showing must be made *in the particular instance*. Thus, in the frank communications exception the competing interests in non-disclosure versus disclosure do not stand on equal footing. Rather, the Legislature has weighted the balance in favor of disclosure.

Footnotes
n11 Federated Publ'ns, Inc v City of Lansing, 467 Mich. 98, 109; 649 N.W.2d 383 (2002).
End Footnotes
It follows that it is not enough to state that there is a public interest in the non-disclosure of communications and notes within a public body or between public bodies that contain other than purely factual materials and that are preliminary to a final agency determination of policy or action. The Legislature has already made such a determination and it is a given. Merely repeating that given advances the analysis not at all. The issue here is whether the interest in non-disclosure clearly outweighs the competing interest in disclosure in this particular instance [*51] . In my view, the majority skirts this issue, in the process conflating two considerably different standards of review.
III. Standard Of Review n12
n12 Note that the standard of review in question here is at the appellate level. At the trial court level, the FOIA explicitly states that the court "shall review the matter de novo and the burden of proof is on the public body to sustain its denial." MCL 15.240(1).
End Footnotes
The majority states in its section on the standard of review that the applicable standard is whether the trial court's ruling constitutes clear error. Curiously, later in its analysis the

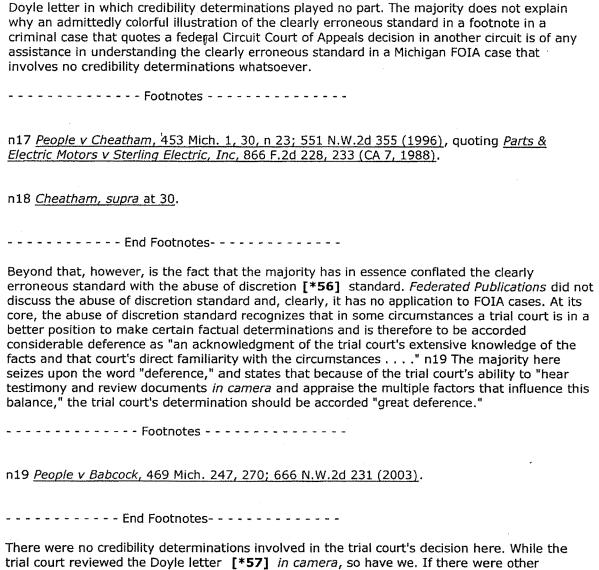
The majority states in its section on the standard of review that the applicable standard is whether the trial court's ruling constitutes clear error. Curiously, later in its analysis the majority revisits the standard of review. In its later analysis, the majority refers to *Federated Publications* to bolster its position that "the clearly erroneous standard was adopted by our Supreme Court to provide deference to trial courts that engage in precisely the type of balancing of public interests conducted here."

This is simply inaccurate, factually and logically. Federated Publications did not [*52] deal at all with the frank communications exemption nor with its explicit "clearly outweigns" standard. Rather, Federated Publications dealt with the FOIA exemption applicable to personnel records of a law enforcement agency. n13 Therefore, Federated Publications did not deal at all with "precisely the type of balancing of public interests conducted here." It dealt with a wholly different "equal footing" balancing scheme applicable to another, and wholly distinct, exemption in which the Legislature had not weighted the scales in favor of disclosure. As articulated in

interest in non-disclosure in the law enforcement exception stand on something akin to equal footing. There is no such equal footing standard in the frank communications exception. That exemption has its own distinct and discrete "clearly outweighs" standard.
Footnotes
n13 <u>MCL 243(1)(s)(ix)</u> .
End Footnotes [*53]
More broadly, there are three general categories of appellate review: de novo, clear error, and abuse of discretion. <i>Federated Publications</i> discussed the first two of these categories. It noted that the Supreme Court had in some instances, and without elaboration, applied a de novo standard of review to FOIA cases. n14 However, <i>Federated Publications</i> limited de novo review to applications of FOIA exemptions involving legal determinations. n15 In a footnote, the majority here propounds the theory that it would be an inefficient use of judicial resources to require appellate courts to review every FOIA challenge de novo. While I generally agree, I do note that <i>Federated Publications</i> appears to stand for the proposition that de novo review is required with respect to the applications of FOIA exemptions involving legal determinations.
Footnotes
n14 <u>Federated Publ'ns, supra at 105-106</u> , citing <u>Bradley v Saranac Community Schools Bd of Ed, 455 Mich. 285, 293; 565 N.W.2d 650 (1997)</u> and <u>Herald Co v Bay Co, 463 Mich. 111, 117; 614 N.W.2d 873 (2000)</u> . [*54]
n15 <u>Federated Publ'ns, supra</u> at 106.
End Footnotes
Federated Publications does hold, squarely, that the clearly erroneous standard of review applies to the applications of exemptions requiring determinations of a discretionary nature and that a finding is clearly erroneous if, after reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made. n16
n16 <i>Id.</i> at 107.
End Footnotes

Federated Publications, and subject of course to the broad policy bias in favor of disclosure and to the narrow scope of the exemptions to disclosure in the FOIA, the interest in disclosure and

The majority, however, is not satisfied with this reasonably straightforward standard and quotes *People v Cheatham* n17 to the effect that to be clearly erroneous a decision must "strike us as wrong with the force of a five-week old, unrefrigerated dead fish." *Cheatam* was a criminal case and, in writing it, Justice Boyle noted that "credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make [*55] this assessment." n18 Credibility is, generally, not at issue in FOIA cases and most certainly not an issue in *this* FOIA case; the trial court here made its decision after an *in camera* review of the



There were no credibility determinations involved in the trial court's decision here. While the trial court reviewed the Doyle letter [*57] in camera, so have we. If there were other "multiple factors" that influenced the trial court's balancing process, those factors are not discernable from the trial court's opinion or from the record in this case. By conflating the clearly erroneous standard with the abuse of discretion standard and, in essence, applying the latter, the majority has made the trial court's decision virtually unreviewable. This is a far cry from a standard that requires us, in order to reverse, to review the entire evidence and come to a definite and firm conviction that the trial court has made a mistake. The deference that is due to the trial court's decision is the deference that flows from a careful review of the evidence and from a reasoned analysis of that decision, no more and no less. I suggest that it is this review that we should be conducting in this case. I further suggest that this is not the review that the majority has conducted.

IV. The "Particular Instance" Of This Case

A. The Majority's View

The majority addresses the particularized circumstances of this case in one very specific instance and then in a series of very broad statements. Specifically, the majority notes that the University's [*58] Board of Regents honorably discharged its obligations. Presumably, the majority here refers to the undisputed fact that the University ultimately released a

comprehensive report on the investigation into the University House controversy that an independent auditing firm had prepared. I agree that the University acted responsibly and in good faith in releasing this report. Were this the only factor bearing on this case, I would be inclined to affirm the trial court's decision. Of course, this is not the only factor involved here. (I do note, however, that the situation here is not precisely the same as in the federal case of Montrose Chemical Corp of California v Train, n20 a decision on which the majority relies. In Montrose, the court was faced with a situation in which all of the facts concerning the matter at issue were in the public record and, therefore, the document that was being withheld was to a considerable extent redundant. Here, an in camera review of the Doyle letter plainly discloses that all the facts are not in the public record.)

n20 <u>Montrose Chemical Corp of California v Train</u>, 160 U.S. App. D.C. 270, 491 F.2d 63 (CA DC, 1974).

The majority then offers a series of generalized policy statements in support of its view. (For example, that "The natural human tendency to 'circle the wagons' or 'play it safe,' coupled with apprehension of retaliation if the written opinion is made public would, we fear, deprive the Board of an important perspective.") Ostensibly, these statements are related to the situation that the University's Board of Regents faced here. However, these generalized concerns do not actually relate to the particular circumstances of this case; in fact, they express an overall view on proper public policy not with respect to *this* instance but as to *future* instances. But speculation as to what may occur in the future is not our task when construing the frank communications exemption of the FOIA. By the language of that exemption, our task is to confine our inquiry to the "particular instance" of this case. If we limit our inquiry to the facts as they exist here, then I am at a loss to understand how the public interest in encouraging frank communications "clearly outweighs" the public interest in disclosure.

B. The Facts As They Exist Here

The majority acknowledges, in passing, that that [*60] the matter here involves the "administration's expenditure of public funds." To me, this fact is central to our consideration of this case. We are not dealing here, as we were in *McCartney v Attorney General* n21 with legal memoranda that the Attorney General's staff prepared regarding the Governor's negotiations with Indian tribes over casino rights. We are not dealing here, as we were in *Favors v Dept of Corrections*, n22 with a comment sheet used by a Department of Corrections disciplinary credit committee to determine whether to recommend the award of disciplinary credits. Rather, we are dealing with the direct expenditure of public funds--derived, we may reasonably assume, from a combination of taxpayer dollars and tuition payments--by the president of a major university for the construction of a residence in which he would live. Further, we are dealing with a situation in which there were allegations, confirmed at least in part by the University's report, that these expenditures were extravagant and inappropriate. Thus, the question of the president's accountability, not just to the University's Board of Regents but also to the taxpaying public, for these expenditures is [*61] at the core of this case.

n21 McCartney v Attorney General, 231 Mich. App. 722; 587 N.W.2d 824 (1988).

n22 Favors v Dept of Corrections, 192 Mich. App. 131; 480 N.W.2d 604 (1991).

Life Poor in the Control of the Cont
The majority's opinion here keeps the Doyle letter, a document that was highly critical of the president, hidden from public view. It posits, in my view, a false choice between "good government" on the one hand and "disclosure for disclosure's sake" on the other. There is no provision in the FOIA for disclosure for disclosure's sake. Rather, there is the broad policy decision by a fully cognizant Legislature that disclosure, because it fosters accountability, facilitates good government. To hide the contents of the Doyle letter behind the facade of a Manichean choice between "good government" and the disclosure of arguably extravagant and inappropriate expenditures of public funds by a public official is not only to run from reality, it is to obscure the very existence [*62] of that reality.
The second fact central to our consideration of this case is that it is apparent that Mr. Doyle had decided to retire well before he wrote his letter to Regent Brandon and, as the trial court noted in its opinion, Mr. Doyle resigned several days after he wrote that letter. The majority's concern that a high level administrator such as Mr. Doyle might be "naturally reluctant" to give his candid opinion of the "highest ranking official in the administration, the president, his immediate superior, whose favor he needs for job security" is thus absolutely unfounded. Mr. Doyle could have no fears as to his future job security, or as to the president's "favor," because he had already decided to retire. Further, he had made that decision known to the president months before he penned his letter to Regent Brandon. n23
n23 I also note that the Legislature has effectively dealt with the fear that employers will retaliate against employees, including public employees with the exception of those in the state classified service, who report violations or suspected violations of laws, regulations, or rules through the enactment of the Whistle-Blowers' Protection Act, MCL 15.361, et seq.
[*63]
In my view these facts determine the outcome in this case, for they exemplify precisely the sort of circumstances the Legislature commanded us to consider in the particular instance of an exemption claimed under the frank communications exemption to the FOIA. The majority avoids this conclusion by turning to case law from other states. It places heavy reliance on the California case of <i>Times Mirror v Superior Court of Sacramento County</i> n24 In that case, the <i>Times Mirror</i> sought disclosure of the Governor's appointment schedules. The California Supreme Court ultimately denied that disclosure, stating: "The deliberative process privilege is grounded in the unromantic reality of politics; it rests on the understanding that if the public and the Governor were entitled to precisely the same information, neither would be likely to receive it." n25
n24 <u>Times Mirror Co v Superior Court of Sacramento Co,</u> 53 Cal.3d 1325; 813 P.2d 240, 283 Cal. Rptr. 893 (1991).
n25 <u>Id.</u> at 1345.
[* 64]
first note that the issue of access to a Governor's appointment schedule simply could not arise

governor, the executive office of the governor or lieutenant governor, or employees thereof." n26 Secondly, and in any event, the California court fell into the same error as the majority here when it expounded its own view of proper public policy, based upon its speculation as to what might happen in the future, while ignoring the language that the Legislature had actually enacted.
n26 <u>MCL 15.232(d)(i)</u> .
End Footnotes
The New York decision in <i>In the Matter of Shaw</i> n27 exhibits the same hubris. At issue were rating reports of a high school referee that had been compiled by high school coaches. There, the court stated that "[a] public dissemination of the ratings would temper an honest and free evaluation with fear of reprisals and animosity and deter a proper decision." The court went on to reach the amazing conclusion that "public [*65] welfare is more important than public knowledge." n28 Remarkably, the majority here cites <i>In the Matter of Shaw</i> , a New York case, for the proposition that the <i>Michigan</i> Legislature had made the policy judgment that public welfare is more important than public knowledge. How a decision construing a New York statute can shed any light whatsoever on the intent of the Michigan Legislature in enacting the FOIA completely eludes me. My puzzlement is increased by the fact that neither the Michigan Legislature nor, to my knowledge, any court ever construing the FOIA in Michigan has ever reached the astounding conclusion that the public knowledge of the functioning of its government is trumped by the incantation of the phrase "public welfare," a phrase that both the New York court and the majority here leave conveniently undefined. If this is the law in Michigan, then the FOIA is simply a dead letter.
n27 <u>Shaw v. Lerer (In the Matter of Shaw)</u> , 112 Misc. 2d 260, 446 N.Y.S.2d 855 (NY S. Ct. 1981).
n28 <u>Id.</u> at 856.
End Footnotes [*66]

in Michigan as the definition of a "public body" does not include "the governor or lieutenant

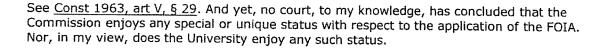
V. The Majority's Response To This Dissent

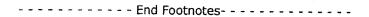
The majority responds to my dissent in this case and I will do the same, briefly. The majority's response commences with the charge that there are "many misstatements, misapprehensions, and mischaracterizations contained in the dissent" Such alliterative ruffles and flourishes neither require nor deserve a response. The majority's view and my own are set out in the language of our respective opinions and I am content to let the chips fall where they may.

More substantively, the majority circles around the question of the standard of review at some length, with frequent references to *Federated Publications*. n29 The majority view appears to have two components. The first is that *Federated Publications* articulates a "clearly erroneous" standard of review. I agree. Indeed, I say exactly that in the body of this dissent. n30 I also point out, however, that *Federated Publications* dealt with the FOIA exemption applicable to personnel records of a law enforcement agency and not to the frank communications exemption at issue here. As the majority appears to concede, the frank communications exemption has its

communications exemption is to be rendered entirely nugatory, this "clearly outweighs" standard, along the requirement to take into account the "particular instance" of a case involving the frank communications exemption, must be part of the public interest balancing that Federated Publications requires.
n29 See <u>Federated Publ'ns, supra.</u>
n30 See ante at
End Footnotes
The second component of the majority's view appears to stem from the rather common-sense observation in <i>Federated Publications</i> that "in contrast with the universe of public records that are non-exemptible, the Legislature has specifically designated these classes of records as exemptible." n31 Of course, the fact that the Legislature designated a class of records as exemptible does not end the inquiry. As the Supreme Court went on to say, "We emphasize that these records are merely exemptible and not exempt, and that exemption is not automatic." n32 And, I suggest, [*68] even when taking into account the Supreme Court's following comment that a reviewing court should remain "cognizant of the special consideration that the Legislature has accorded an exemptible class of records," n33 that special consideration can be trumped by a conclusion that the records should be made public when, as here, the public interest in encouraging frank communication does not clearly outweigh the public interest in disclosure.
Footnotes
n31 <u>Federated Publ'ns, supra at 109</u> .
n32 <i>Id</i> .
n33 <u>Id. at 110</u> .
End Footnotes
In short, I do not see the conflict in emphasis upon which the majority seizes. To me, the process is rather simple. Under <i>Federated Publications</i> , we are to review a lower court's decision under a "clearly erroneous" standard. Under the language of the frank communications exemption, that review necessarily involves a special inquiry into whether the public interest in encouraging frank communications "clearly outweighs" the public in disclosure. The second [*69] inquiry is just as important as the first and neither can be disregarded. Indeed, in my view at least, the two inquiries constitute a seamless whole. n34
n34 The majority also refers to the University as a "constitutionally mandated board." The University is specifically mentioned in § 4, art VII of the 1963 Constitution and is covered by § 6, art VII. But, for example, the Civil Rights Commission is also a constitutionally created entity.

27 of 29





In this regard, the majority states that I disagree with the trial court's findings. Indeed, I do. But I do not simply disagree. After reviewing the entire evidence, I am left with the definite and firm conviction that the trial court made a mistake. As set out below, that mistake was in ignoring the special "clearly outweighs" standard [*70] contained in the frank communications exemption and thereby ignoring the fact that, with respect to this particular exemption, the Legislature has made a policy decision that tilts the balance in favor of disclosure. n35

n35 The majority also states, inferentially, that I have speculated on "(1) why Doyle wrote what he did; (2) when he wrote the letter; (3) whether Doyle is credible to the Board in his opinions; (4) how the Board may have judged his credibility, reliability, or sincerity; or (5) what the Board may have known about the relationship between Doyle and the University president and how this impacted on their decision regarding further investigations." Try as I might, I can find no such speculation in my dissent. The majority here perhaps engages in the informal, but material, fallacy of tu quoque: meeting criticism with the argument that the other person engages in the very conduct he or she is criticizing. I have indeed suggested that majority is speculating as to the policy effect of future events. The statement that I myself have done the same is, to put it gently, without any foundation, at least that I can find, in the words of my dissent.

----- End Footnotes-----[*71]

VI. Conclusion

In its conclusion, the majority states that:

Here, in balancing the public interests, the trial court determined that the Board's important, constitutional oversight function and investigative role, and thus, the public interest in good government, would be better served by nondisclosure rather than disclosure of the Doyle letter. In so finding, the trial court did not err.

I see nothing in the trial court's opinion referring to the "important, constitutional oversight function and investigative role" of the University's Board of Regents. However, I do agree that the trial court found in essence that non-disclosure of the Doyle letter would better serve the public than would disclosure. And it is for that precise reason that the trial court's decision was clearly erroneous.

In its opinion, the trial court reached a general conclusion: "The public interest in encouraging frank communication within the public body or between the public bodies clearly outweighs the public interest in disclosure." The trial court apparently recognized, however, that such a general conclusion standing alone could not carry the day. The trial court therefore went on to say that:

Plaintiff's [*72] specific need for the letter, apparently to "shed light on the reasons why a highly respected public official resigned in the wake of EMU being caught misleading the public as to the true cost of the President's house", (sic) or the public's general interest in disclosure, is outweighed by Defendant's interest in maintaining the quality of its deliberative and decision-making process.

Obviously, the trial court was aware of the "clearly outweighs" standard. However, when analyzing the particular instance of the Herald Company's FOIA request, it ignored that standard. Rather, the trial court simply balanced the interest in non-disclosure against the interest in disclosure and came down on the University's side. In so doing, the trial court failed to recognize that, under the FOIA's frank communications exemption, the interest in non-disclosure and the interest in disclosure do not stand on equal footing. With respect to this particular exemption, the Legislature has weighted the scales in favor of disclosure. Ignoring this Legislative policy decision is the very definition of clear error.

The majority commits the same error. It states that, "when, as here, the public body makes the [*73] proper showing that good governance is better served by nondisclosure rather than disclosure, it will not be required to release the information." Like the trial court, the majority is obviously aware of the "clearly outweighs" standard. Indeed, it quotes that standard it its very next sentence. Like the trial court, however, it then simply ignores that standard. Like the trial court, it balances the supposed harm that may flow from disclosure against the supposed good that may flow from non-disclosure, in the future as a policy matter, without regard to the legislatively imposed mandate that requires consideration of the particularized instance of this case. Like the trial court, it overlooks the concept of accountability that is at the core of the FOIA. Like the trial court, therefore, it clearly errs.

In my view, this error is profound. The majority reaches the astounding conclusion that in Michigan the "public welfare,"--defined without regard to the particular circumstances of this case--is more important than public knowledge. If this is the law of this state, then the Legislature's broad policy decisions in the FOIA and its carefully-tuned implementing mechanisms are [*74] without meaning. In the process, a narrowly tailored exemption from the broad sweep of the Act will have swallowed the overall rule. Within the context of the frank communications exception, this consigns our citizens to the receipt of only that information that the public body determines it is safe, according to *its* definition of the public welfare, to release. I cannot agree that this is the result the Legislature intended. I would reverse and remand.

/s/ William C. Whitbeck

Source: Legal > States Legal - U.S. > Michigan > Cases > MI State Cases, Combined

Terms: eastern michigan and whitbeck (Edit Search)

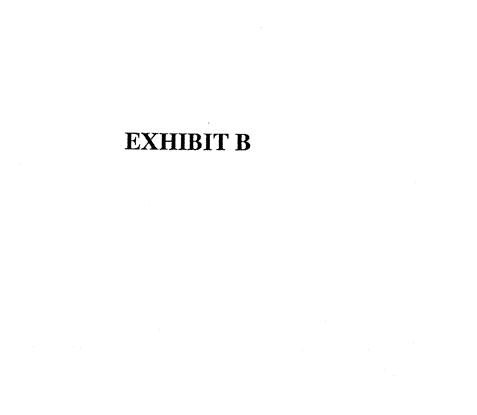
View: Full

Date/Time: Thursday, March 3, 2005 - 5:14 PM EST

About LexisNexis | Terms and Conditions

Copyright @ 2005 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

B



Search sults

Source: News & Business > News > News, Most Recent Two Years (English, Full Text)

Terms: freedom of information /p (reporter or newspaper) and atleast5(freedom of information) and

atleast5(reporter! or newspaper!) (Edit Search)

◆Select for FOCUS™ or Delivery

Detroit Free Press March 13, 2005 Sunday 1 EDITION

Copyright 2005 Detroit Free Press All Rights Reserved

Detroit Free Press

Found on Freeps com
Detroit Free Press

March 13, 2005 Sunday 1 EDITION

LENGTH: 2040 words

HEADLINE: SUNSHINE WEEK: The value of knowing

BODY:

Without them, you wouldn't know some government secrets.

You wouldn't know the high-dollar details behind a recent Oakland County school district scandal. You wouldn't know how the federal government turned its back on ill and aging World War II vets exposed to dangerous chemical testing. You wouldn't know how some public employees retire with comfy six-figure pensions.

You wouldn't know these stories and many others if not for open records.

Starting today, through an effort dubbed Sunshine Week, news organizations across America are heralding the need to keep government records open to the public.

News organizations complain that access to records has tightened at all levels of government in recent years, particularly since Sept. 11, 2001. The media say access is being thwarted by long delays in the release of information, overbroad denials of records based on privacy, business or national security rationales, and attempts to charge large fees for records -- sometimes thousands of dollars.

Government officials counter that requests are sometimes too broad, burdensome and costly, and that requests at times seek information that the officials say cannot legally be disclosed. Government bodies say they're required to balance the interests of public disclosure against the legal provisions that bar the release of some information. Highlighted here are some recent Free Press projects that relied extensively on government records, many of them obtained through **Freedom of Information** Acts that govern federal, state and local records. Most of the stories prompted public response and policy changes.

This is the story behind the stories.

** THE STORY: In late 2003 and early 2004, **reporters** Lori Brasier and David Zeman examined the spending practices of the Oakland Intermediate School District, also known as Oakland Schools, a public agency with a \$250-million annual budget and responsibility for providing services to special-needs children and vocational students.

WHAT IT SHOWED: The series of stories documented millions of dollars in financial blunders, questionable spending and cozy consulting deals given to people with close ties to top district

officials. School administrators spent tax money on lavish trips, expensive dinners, alcohol, jewelry, Waterford crystal, Palm Pilots, expensive leather goods, golf and limousines.

Under now departed Superintendent James Redmond, the district also spent more than \$9 million on high-tech ventures that flopped or were rarely used in classrooms, and sank \$30 million in a new administration building. After the stories ran, four of the five board members resigned. The Legislature passed new laws governing intermediate school districts, and Redmond faced criminal charges. On March 16, he was convicted of felony misconduct in office and misdemeanor conflict of interest charges. He's awaiting sentencing.

RECORDS USED: The **newspaper** filed dozens of **Freedom of Information** Act requests that produced nearly 20,000 pages of documents. The district resisted handing over some records and attempted to charge fees that the **newspaper** complained were excessive. Under the threat of legal action, the district opened its records.

** THE STORY: In "Public Pensions, Private Jackpots" -- a series published Dec. 13-14 -- Lansing bureau chief Chris Christoff examined large pensions for retired public officials in southeast Michigan communities and counties. Annual pensions topping \$100,000 were not unusual for police and fire officials, and among some longtime Wayne County employees. Often pensions were much higher than the retirees would have earned in the private sector.

WHAT IT SHOWED: The series showed how some officials used political clout and liberal pension rules to retire with large pensions. One police chief retired with a \$150,000-a-year pension, far more than his final salary of \$88,000. Wayne County's sheriff had manipulated the county pension system to retire two years earlier than he could otherwise with a full annual pension of \$72,800, on top of his current sheriff's salary. Rising pension costs resulted in tax increases in several metro Detroit communities in the past year, at a time when teacher retirements are placing heavy burdens on the state. Some cities created generous employee pension plans, rather than increase wages, thus pushing the cost of government to future taxpayers.

RECORDS USED: The Free Press filed more than 20 **Freedom of Information** requests to examine employee pension systems in 21 southeast Michigan municipalities, the State of Michigan and Wayne, Oakland and Macomb Counties. Local tax records, political campaign materials and records from the U.S. Department of Defense were used to tell the story. Five local pension boards refused FOIA requests to divulge the names, job descriptions and benefit payments of retirees, citing privacy concerns. The Free Press sued four communities and won a Wayne County Circuit Court decision against them. The case is under appeal by the communities.

** THE STORY: In a three-part series published last November, David Zeman chronicled the betrayal of thousands of World War II veterans subjected to secret chemical tests during the war. The stories -- "Duty, Honor, Betrayal: The forgotten men of 1st Chemical Casual Company" -- described how many of the men fell victim to cancers and other illnesses linked to the testing. More than 4,000 soldiers and sailors were exposed to toxins in gas chambers and field exercises to help scientists learn how to protect combat troops from possible chemical attacks.

WHAT IT SHOWED: The stories revealed that the U.S. Department of Veterans Affairs broke nearly all the promises it made to Congress in the 1990s, when VA officials pledged to track down the men and extend benefits to those who were sickened. The agency did not contact any veterans, despite having access to a military database listing contact information for thousands of aging chemical veterans. Instead, the VA relied on public service advertisements in veteran magazines, even though agency officials acknowledged they were aware that the majority of veterans don't receive the publications.

The few veterans who filed disability claims generally were rebuffed, even though they had persuasive evidence that their illnesses were linked to the secret tests. Since the stories were published, the VA has unveiled plans to track down the thousands of veterans still alive and assist them in applying for benefits that may be due to them.

RECORDS USED: The report was based on thousands of military and medical records, including computer databases, obtained under the federal Freedom of Information Act from the U.S. Defense Department, the VA, the U.S. Army and Navy, and Edgewood Arsenal, Md., where many of the veterans were tested. Scores of veterans, or their survivors, signed waiver forms giving the Free Press access to their service and VA files. Even so, it took months to obtain some of the records from the government. The reporting also relied on birth and death records. court filings and records from the federal Institute of Medicine.

** THE STORY: In February, in a series titled "Under the Influence," reporters Jennifer Dixon and Victoria Turk examined the workings of one of Michigan's most powerful lobbies, the Michigan Beer & Wine Wholesalers Association. Since 1933, following the repeal of Prohibition. state law has quaranteed that the state's wholesalers distribute nearly all the beer and wine sold in Michigan.

WHAT IT SHOWED: The story examined how the wholesalers court politicians to protect a business structure that allows them to have competition-free territories for the brands they sell. The result, critics say, is that a small number of companies control nearly all of the alcohol distributed in Michigan, leading to higher prices than in surrounding states.

The wholesalers have sought to protect their interests through extensive lobbying in Lansing, an effort that includes taking lawmakers on all-expenses-paid trips to exotic locations every winter. The wholesalers' political action committee has showered campaign contributions on virtually every state lawmaker and other top elected officials. And the group has cultivated a close relationship with regulators, at times having secret meetings with the Michigan Liquor Control Commission to discuss policy and enforcement issues. Since the series was published, Gov. Jennifer Granholm's office has directed the commission to be sure that it is complying with open meetings laws.

RECORDS USED: The newspaper relied on Freedom of Information Act requests with the Liquor Control Commission to obtain records related to the commission's dealings with the beer and wine wholesalers. The reporters also examined thousands of pages of campaign finance disclosure forms filed with the secretary of state by members of the Legislature and other politicians, including the attorney general, lieutenant governor and governor. Those records are available on line at www.mich.gov

** THE STORY: In April 2003, reporters M.L. Elrick and Jim Schaefer reported that police officers in charge of Detroit Mayor Kwame Kilpatrick's security team had racked up extraordinary amounts of overtime.

WHAT IT SHOWED: The story exposed how some of the police who guard the mayor and his family were raking in time-and-a-half pay while Kilpatrick was ordering city departments to cut payroll costs. One bodyguard, who played high school football with the mayor, more than doubled his base salary. Kilpatrick's security team in 2002 more than tripled the amount of overtime paid the year before, which was Dennis Archer's last year as mayor. Overtime payments for police protecting the mayor and police chief cost taxpayers more than \$260,000.

Michigan Attorney General Mike Cox later found that the two leaders of Kilpatrick's security team "received inordinate amounts of overtime pay." Kilpatrick's security team was overhauled, and top police officials said they would review how the unit was run. In July 2004, then-Assistant Police Chief Walter Shoulders said: "There was no adequate oversight and supervision." He said the security team essentially had been run without rules.

RECORDS USED: Using the Freedom of Information Act, the reporters obtained time cards for police on security teams for the mayor, police chief and city council. The city produced the records only after a lengthy delay.

** THE STORY: In 2003, a team of reporters produced a year-long series called "Damaged

Lives: Lead's Toxic Toll." The stories revealed the harmful scope of lead poisoning in Michigan. The stories explained how 22,000 Michigan children suffered from lower intelligence because of lead poisoning, while also examining the fallout from old lead smelters, the hidden dangers of leaded gasoline in soil and the failure of government agencies to eradicate dangers in neighborhoods and in low-income housing.

WHAT IT SHOWED: Stories detailed how the U.S. Environmental Protection Agency, despite knowing of the dangers, failed to clean up an impoverished Detroit neighborhood after a lead smelter polluted it. Other stories showed how Detroit and Michigan got less federal money than other states and cities because they mishandled grants. In addition, the reporting revealed that children in the Medicaid program weren't being tested, as the law required. Among changes, the EPA ordered a cleanup, and the state began coordinating efforts to combat lead poisoning.

RECORDS USED: The report was based, in part, on more than 10,000 pages of government documents and scientific articles. More than a dozen **Freedom of Information** requests were filed at various levels of government, from the city of Detroit to the U.S. Department of Housing and Urban Development. The Michigan Department of Community Health insisted a database containing relevant lead records did not exist. The Free Press sued and won. The records were used to show the location of the most lead-poisoned blocks in the state. HUD delayed the release of documents during the seven-month project, finally providing them more than a year after the coverage began.

LOAD-DATE: March 13, 2005

Source: News & Business > News > News, Most Recent Two Years (English, Full Text)

Terms: freedom of information /p (reporter or newspaper) and atleast5(freedom of information) and

atleast5(reporter! or newspaper!) (Edit Search)

View: Full

Date/Time: Friday, April 8, 2005 - 3:03 PM EDT

About LexisNexis | Terms and Conditions

Copyright © 2005 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

Search - 32 Results - freedom of information /p (reporter or newspaper... https://www.lexis.com/research/retrieve?_m=2b002f4ffcd8321fbde64...

Source: News & Business > News > News, Most Recent Two Years (English, Full Text) Terms: freedom of information /p (reporter or newspaper) and atleast5(freedom of information) and

atleast5(reporter! or newspaper!) (Edit Search)

FSelect for FOCUS™ or Delivery

Press & Sun-Bulletin March 13, 2005 Sunday

Copyright 2005 Press & Sun-Bulletin (Binghamton, NY) All Rights Reserved Press & Sun-Bulletin

March 13, 2005 Sunday

SECTION: FRONT; #column#; Pq. 11A

LENGTH: 1029 words

HEADLINE: SUNSHINE WEEK - Law helps journalists gather facts, answer questions

BODY:

Newspaper reporters frequently use the Freedom of Information Law to gather facts for stories.

Information in the documents obtained under the law can add detail, answer questions about events and policies, clear up misconceptions and serve as the basis for investigative reports.

Here are some examples of how the Press & Sun-Bulletin has used the law.

Nursing home flaws exposed

A Press & Sun-Bulletin investigation in 2002, based mainly on an examination of state Health Department records obtained under the Freedom of Information Law, found serious flaws in the state's system for policing nursing home care-givers across the state.

Then-reporter Brad Heath reviewed 761 complaints of abuse, neglect and mistreatment by nursing home workers between 1998 and 2000. It took the agency more than 18 months to turn over a listing of those cases, a clear violation of FOI Law.

The investigation found the Health Department, the agency in charge of keeping New Yorkers' loved ones safe, had responded to serious and sometimes lethal lapses in care with secrecy, slow investigations and token penalties.

In one local case, it took the department almost two years to determine what happened in the death of an 87-year-old woman who had been a resident at Ideal Senior Living Center in Endicott. A caregiver ignored doctors' orders that the woman be propped up in bed while she slept. She vomited. Fearing fluid in her lungs might be cutting off the woman's breathing, a nurse at Ideal ordered her sent to the hospital. By then, there was nothing anyone could do. The woman died six hours later. The state did not specifically blame the aide for the woman's death. The woman's family was never told anything had gone wrong with their mother's care.

Bridge delays explained

In the fall of 2002, reporter Kara M. Conners used the Freedom of Information Law to obtain the construction contract for the Court Street Bridge in Owego, after the state Department of Transportation announced the bridge would not be finished by the deadline in 2002. The contract, with the Fahs-Rolston Paving Corp., also contained details of an incentive payment for finishing early and a financial penalty for failure to finish on time. The request also sought all bids on the project and related information.

Over the next 10 months, while thousands of people used detours into the village, DOT:

- * Denied requests.
- * Said some documents did not exist.
- * Said it couldn't respond to the FOIL because it had been sent to the wrong person.

At one point, the DOT said it would cost about \$425 for copies of the contract. A **reporter** drove to Albany and read the documents.

Hundreds of documents showed disputes over designs, discrepancies in when the work would be completed and battles over who was responsible for the delays. In the end, although the bridge opened in June 2003, no penalty was assessed.

Record set straight

When a fire in April 1999 did as much damage to the West Endicott Fire Department as it did to a Bassett Avenue home, **Freedom of Information** Law helped set the record straight.

Bystanders initially claimed West Endicott firefighters didn't arrive for nearly 30 minutes, by which time the house could not be saved. Broome County dispatchers' logs recorded the first engine on the scene in 14 minutes -- long enough to mean the difference between a gutted house and a saved house.

A second check of the radio traffic obtained under FOIL showed a cacophony of radio chatter around the eight-minute mark -- about the time West Endicott firefighters claimed their first engine arrived. A faint click was audible, suggesting one transmission "walked over" another, presumably the transmission of the first engine on the scene.

Videotape showed that engine, with hoses in the house, at the 14-minute mark -- suggesting the engine had arrived earlier, because setting up the hoses can take up to 2 1/2 minutes.

The result of the FOIL-inspired investigation was inconclusive about when that engine arrived, but it was clearly before the 14-minute mark, saving the fire department's reputation.

Parking scofflaws identified

The city of Binghamton laid out a campaign in July 2003 to collect unpaid parking fines that Mayor Richard A. Bucci estimated at tens of thousands of dollars.

City officials, while saying they were sending letters to the parking scofflaws, said the names of the most frequent offenders were not immediately available. Using the **Freedom of Information** Law, then-**reporter** Liz Sadler filed a request for copies of letters the city mailed seeking payment.

Officials denied the request, citing "Unwarranted invasion of privacy."

The newspaper, after consulting with the state Committee on Open Government, successfully appealed the decision and printed the names of 20 people who owed the most. The woman who headed the list owed \$895 in fines.

Staff writers Todd McAdam, Kara Conners, and Linda Miller contributed to this report.

HOW AGENCIES RESPONDED TO FOIL REQUESTS

Search - 32 Results - freedom of information /p (reporter or newspaper... https://www.lexis.com/research/retrieve?_m=2b002f4ffcd8321fbde64...

The Press & Sun-Bulletin used **Freedom of Information** requests to ask 11 Southern Tier government agencies about the FOIL requests filed with them in 2004.

How they responded:

- * Broome County, Binghamton, Vestal, Union, Johnson City and Endicott responded within a day of the request to make arrangements to view the records.
- * Tioga County responded within the required five business days acknowledging and approving the request, but asked for time to redact information that would be an unwarranted invasion of personal privacy.
- * Binghamton University and Empire State Development acknowledged receipt of the FOIL in letters dated six business days after their likely receipt. BU asked for 10 days to review the request. Empire State Development said response would be made "in the near future," which does not comply with state law.
- * The State University of New York's Construction Fund said it needed more information because the request asked for information from Broome, Tioga and Chenango counties, and the fund didn't have that information. It asked for specific communities instead.
- * The Binghamton City School District did not respond.

LOAD-DATE: March 16, 2005

Source: News & Business > News > News, Most Recent Two Years (English, Full Text)

Terms: freedom of information /p (reporter or newspaper) and atleast5(freedom of information) and

atleast5(reporter! or newspaper!) (Edit Search)

View: Ful

Date/Time: Friday, April 8, 2005 - 3:05 PM EDT

About LexisNexis | Terms and Conditions

Copyright © 2005 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.